CLERK'S OFFICE

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 349

MAYFLOWER FARMS, INC., APPELLANT,

vs.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 7, 1935.

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[fol. a]

IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 16th day of April, in the year of our Lord one thousand nine hundred and thirty-five, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, presiding. Wm. J. Armstrong, Clerk.

REMITTITUR—April 17, 1935

[fol. b] In the Matter of the Application of MAYFLOWER FARMS, INC., for a Certiorari Order vs. CHARLES H. BALDWIN, Commissioner of Agriculture and Markets of the State of New York, and ano.

Be it remembered, That on the 12th day of January, in the year of our Lord one thousand nine hundred and thirty-five, Mayflower Farms, Inc., the appellant in this cause, came here unto the Court of Appeals, by Seymour Ellenbogen, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York and another, the respondents in said cause, afterwards appeared in said Court of Appeals by Henry S. Manley, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. c] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Seymour Ellenbogen, of counsel for the appellant, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. d] Stamp: Office of Albany County Clerk. Aug 5, 11:33 A. M. '35. Albany, N. Y.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, April 17, 1935.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J Armstrong, Clerk. (Seal State of New York Court of Appeals.)

[fols. 1-3] In Supreme Court of New York, Albany County

Present: Hon. Pierce H. Russell, Justice.

In the Matter of the Application of Mayflower Farms, Inc., Petitioner,

for a Certiorari Order against

Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth F. Fee, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, Defendants

Order of Certiorari—July 27, 1934

The Mayflower Farms, Inc., being aggrieved by a decision of the Commissioner and Director of the Division

of Milk Control of the Department of Agriculture and Markets of the State of New York, presents its petition, duly verified the 13th day of July, 1934, setting forth that [fol. 4] said decision is illegal and specifying the ground of illegality and asking for a certiorari order directed to said Department and Division and for a stay of proceedings pending the determination thereof, and after hearing Harry L. Marcus, Esq., attorney for petitioner, Herbert L. Maltinsky of counsel, in support of this application, and Henry S. Manley, Esq., attorney for defendants, Robert G. Blabey, Esq., of counsel, in opposition thereto, and due deliberation having been had, and the petitioner having shown a proper case for the granting of a certiorari order and for a stay of proceedings pending the determination thereof,

Now, upon the petition of Bertha Silberman, duly verified the 13th day of July, 1934, and on motion of Harry L. Marcus, attorney for petitioner, it is

Ordered that Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth F. Fee, Director of the Division of Milk Control of said Department, produce at the office of the Clerk of the Supreme Court of the County of Albany, City of Albany, State of New York, within twenty (20) days after the service of a copy of this order, all actions and proceedings of the said Department of Agriculture and Markets and/or Division of Milk Control in the above entitled matter, with a certified or sworn copy of all petitions, appeals, applications, notices, documents, letters, affidavits or other papers before or acted upon by said De- [fol. 5] partment or Division, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of the said Department or Division, with the minutes of all inspections, examinations and hearings and such other facts as may be pertinent and material to show the ground of the decision in the aforesaid matter; and it is further

Ordered that a copy of the said return be served upon the attorney for the petitioner, at his office, No. 50 Court Street, Brooklyn, New York, within twenty (20) days from the date of the service of a copy of this order upon the defendants; and it appearing to my satisfaction that irreparable damage will result if the Department of Agriculture

and Markets or the Division of Milk Control should execute or take action to enforce its order dated July 9th, 1934, and before a determination of this Certiorari proceeding can be had, it is further

Ordered that during the pendency and until the final determination of this order of certiorari the defendants, their agents, servants or employees are stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce its order dated July 9th, 1934, upon the condition that all papers in this certiorari proceeding be perfected and the matter be placed on the September calendar of the Appellate Division; if [fol. 6] the foregoing condition is not complied with then the stay granted herein shall be vacated.

Enter.

Pierce H. Russell, J. S. C.

In Supreme Court of New York, County of Albany

[Title omitted]

Notice of Application for Certiorari Order

Sir:

Please take notice that upon the annexed petition of Bertha Silberman, duly verified the 13th day of July, 1934, [fol. 7] the undersigned will move at a Special Term of the Supreme Court, County of Albany, to be held at the Court House thereof, on the 27th day of July, 1934, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, for an order of certiorari directed to the above named defendants together with a stay of all proceedings pending the hearing and determination of the application and petition, and for such other, further and different relief as to the Court may seem just and proper in the premises.

Dated July 13th, 1934.

Harry L. Marcus, Attorney for Petitioner, Office and P. O. Address, 50 Court Street, Borough of Brooklyn, City of New York.

To Henry S. Manley, Esq., Counsel to the Department of Agriculture and Markets, Albany, N. Y.

IN SUPREME COURT OF NEW YORK

[Same title]

PETITION OF MAYFLOWER FARMS, INC., FOR CERTIORARI ORDER

To the Supreme Court of the State of New York:

The petition of Mayflower Farms, Inc., by Bertha Silberman, its president, respectfully shows this Court and alleges:

[fol. 8] First. That at all times hereinafter mentioned, Mayflower Farms, Inc., was and still is a domestic corporation, incorporated under the Laws of the State of New York, and having its office and principal place of business in the Borough of Brooklyn, City of New York.

Second. That pursuant to Chapter 158 of the Laws of 1933, entitled Article 25, the petitioner applied for a license from the Department of Agriculture and Markets, Milk Control Board, to conduct its milk business in the City of New York.

Third. That on or about September 6th, 1933, a license bearing number 3016 was duly issued to the petitioner permitting and enabling the Mayflower Farms, Inc., to conduct its business within the City and State of New York.

Fourth. That pursuant to Chapter 126 of the Laws of the State of New York, effective April 1st, 1934, an amendment to Article 21 of the Agriculture and Markets Law was enacted by the Legislature of the State of New York and duly approved by the Governor of the said State, creating a Division of Milk Control, headed by a director to be appointed by the Commissioner of Agriculture and Markets and to serve during his pleasure.

Fifth. That upon information and belief, the Commissioner of Agriculture and Markets of the State of New York is Charles H. Baldwin.

[fol. 9] Sixth. That in pursuance of the foregoing enactment and amendment, Kenneth F. Fee, was duly appointed as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York.

Seventh. That in accordance with Section 258 of Chapter 126 of the Laws of 1934, the Mayflower Farms, Inc., duly made application for a milk dealer's license and duly paid the license fee required therefor.

Eighth. That the Mayflower Farms, Inc., has duly complied with all the rules, regulations and sections of the Agriculture and Markets Law required by a milk dealer as a prerequisite to the granting to it of a license by the Division of Milk Control.

Ninth. That pursuant to Section 258 C of Chapter 126 of the Laws of 1934, the Commissioner of the Department of Agriculture and Markets may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant when satisfied of the existence of any of the conditions enumerated in paragraphs "A" to "M" of Section 258 C.

Tenth. That at no time has Mayflower Farms, Inc., been guilty of any of the conduct enumerated in paragraphs "A" to "M" of Section 258 C of chapter 126 of the Laws of 1934.

[fol. 10] Eleventh. That on or about the 13th day of June, 1934, the Mayflower Farms, Inc., received a notice requesting it to appear before the Commissioner of Agriculture and Markets in respect to its application for a license for the year ending March 31st, 1935, pursuant to Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934).

Twelfth. That on or about the 18th day of June, 1934, a representative of Mayflower Farms, Inc., who was familiar with the business of the Company, appeared before the said Commissioner in response to the aforementioned notice.

Thirteenth. That the aforementioned notice failed to properly advise the petitioner of any particular or specific charge against it nor was any particular or specific charge alleged against the said petitioner at any time during the said hearing.

Fourteenth: That at said hearing a general examination of the president of the petitioner was had without regard

to the notice and without regard to the Constitutional rights and privileges of the petitioner.

Fifteenth. That at no time during the entire hearing was a specific violation of any of the sub-divisions "A" to "M" of Section 258 C made against Mayflower Farms, Inc.

[fol. 11] Sixteenth. That on or about the 10th day of July, 1934, an order was served upon the Mayflower Farms, Inc., denying its application for a milk dealer's license.

Seventeenth. That nowhere in the said order nor at any time during the alleged hearing was there any ground or charge made against the petitioner, nor was there any reason given for the denial of its application for a license.

Eighteenth. That upon information and belief, and solely from the reading of the alleged notice, a possible alleged charge might be that the petitioner was selling milk in New York City at the "unadvertised Brand Price", in violation of the Rules and Orders of the Division of Milk Control.

Nineteenth. That if such be the charge, then such alleged charge is false and untrue in respect to the alleged violation by the petitioner of the price fixing orders of the Division.

Twentieth. That the Mayflower Farms, Inc., at no time sold any other milk but "unadvertised" milk.

Twenty-first. That the attempt on the part of the Division of Milk Control to compel the Mayflower Farms, Inc., to sell its product for more than its competitors selling the same product at the "unadvertised price" is unjust, improper, illegal and unconstitutional.

[fol. 12] Twenty-second. That Section 258 Q of Chapter 126 of the Laws of 1934, under which the Division of Milk Control purports to act, has not application to the creation of the Division of Milk Control, is illegal, unconstitutional, unjust and prejudicial and in violation of Article I, Section VI, of the Constitution of the State of New York, and in violation of the Constitution of the United States, in that said Section, if it be enforced, deprives Mayflower Farms, Inc., of the right to engage in the milk business and limits the right to engage in the milk business to a particular class.

Twenty-third. That the action of the Division of Milk Control and the Department of Agriculture and Markets in denying the petitioner's application for a milk dealer's license is erroneous, improper, illegal, unjust, capricious, prejudicial and unconstitutional, and, if the said denial is permitted to stand, same will create undue and unnecessary hardship to Mayflower Farms, Inc., and will result in destroying its business and good will and depriving it of its property and business without due process of law and in violation of the Federal and State constitution.

Twenty-fourth. That pursuant to Section 258 D of Article 21, Chapter 126 of the Laws of 1934, the action of the Commissioner in refusing to grant or renew a license or in revoking or suspending a license, may be reviewed by Certiorari in the manner provided by the Civil Practice Act.

[fol. 13] Twenty-fifth. That no previous application for an order of certiorari has been made nor has any application been heretofore made to stay the order of the Division of Milk Control from taking effect and until the hearing and determination of the application herein.

Twenty-sixth. That thirty (30) days have not elapsed since the order of the Division of Milk Control hereinabove set forth was made, or since due notice thereof was given to Mayflower Farms, Inc.

Twenty-seventh. That unless a stay of the order aforementioned is granted during the pendency of this application, Mayflower Farms, Inc., will be unable to conduct business legally within the State of New York, and irreparable damage will be done to said Mayflower Farms, Inc., because of the loss of business in confiscation of its property as a result thereof.

Wherefore, petitioner prays for an order of certiorari, directed to the Commissioner of Agriculture and Markets and to the Director of the Division of Milk Control of the State of New York, requiring the return to this Court of all actions and proceedings of the said Department of Agriculture and Markets and/or Division of Milk Control in the above entitled matter; with a certified or sworn copy of all petitions, appeals, applications, notices, documents, letters, affidavits or other papers before or acted upon by said De-

[fols. 14-18] partment or division, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of the said Department or Division, with the minutes of all inspections, examinations and hearings and such other facts as may be pertinent and material to show the ground of the decision in the aforesaid matter and petitioner further prays for an order staying the Department of Agriculture and Markets and the Division of Milk Control during the pendency of this application and the determination thereof, from bringing any action or proceeding to enforce its order dated July 9th, 1934.

Dated July 13th, 1934.

Mayflower Farms, Inc., by Bertha Silberman, Petitioner.

[fol. 19] IN SUPREME COURT OF NEW YORK

[Same title]

RETURN TO ORDER OF CERTIORARI

The above named Commissioner of Agriculture and Markets and Director of the Division of Milk Control, the respondents herein, for a return to an order of certiorari heretofore granted and to the petition upon which the same was granted, respectfully make return thereto as follows:

I. Respondents deny each and every conclusion of law and of fact in said petition contained and submit the same to the Court.

[fol. 20] II. Respondents do hereby certify and return that the following constitute "all actions and proceedings of the said Department of Agriculture and Markets and/or the Division of Milk Control in the above entitled matter," with a certified or sworn copy of all petitions, applications, notices, documents, letters, affidavits or other papers acted upon, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of said department, as well as exhibits and testimony, and such other facts as may be pertinent and material to show the ground of the decision in said matter.

1. Application of petitioner for a milk dealer's license pursuant to the provisions of Article 21 of the Agriculture

and Markets Law (Chapter 126 of the Laws of 1934). (Exhibit 2 on the hearing held on said application on the 18th day of June, 1934).

2. Notice of hearing addressed to Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York, together with return receipt of the United States Post Office Department showing delivery of said notice (Exhibit 1 on said hearing of June 18, 1934).

3. List of grocery stores to whom petitioner sold milk (Exhibit 3 on said hearing of June 18, 1934).

4. Copy of official order of the Milk Control Board dated November 22, 1933, in the matter of the revocation of license issued to Mayflower Farms, Inc., under Article 25 of the [fol. 21] Agriculture and Markets Law (Chapter 158 of the Laws of 1933 (Exhibit 4 on said hearing of June 18, 1934).

5. Copy of order of the Appellate Division, Third Department, dismissing petitioner's appeal from said official order of the Milk Control Board dated November 22, 1933 (Exhibit 5 on said hearing of June 18, 1934).

6. Copy of milk bottle cap made Exhibit 6 on said hearing of June 18, 1934.

7. Transcription of the minutes of hearing held June 18, 1934, on petitioner's application for license pursuant to the provisions of Article 21 of the Agriculture and Markets Law for the license year ending March 31, 1935.

8. Memorandum of J. W. Harnach to Assistant Counsel Robert G. Blabey, dated July 3, 1934.

9. Memorandum of Assistant Counsel Robert G. Blabey to Director Kenneth F. Fee under date of July 3, 1934.

10. Memorandum of Director Kenneth F. Fee to Assistant Counsel Robert G. Blabey under date of July 7, 1934.

11. Official order denying petitioner's application for license, dated the 9th day of July, 1934.

In witness whereof, the respondents have hereunto af- [fol. 22] fixed their signature and the seal of the said Division of Milk Control this 22nd day of August, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York. Kenneth F. Fee, Director of the Division of Milk Control. (Seal.)

EXHIBIT NO. 2 ANNEXED TO RETURN

June 18, 1934

(Copy)

Application for a Milk Dealer's License

(Article 21 of the Agriculture and Markets Law)
(Chapter 126 of the Laws of 1934)

(Approved)

To the Commissioner of Agriculture and Markets, Albany, N. Y.:

The undersigned hereby applies for a license to purchase, handle, sell or distribute milk, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, [fol. 23] for the period ending March 31, 193–, and in support of such application makes the following statements and answers to questions:

1. Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York. 58. (See that name and address of applicant is correctly stated.)

2. Were you, on January 1, 1933, doing business as a milk dealer under the name given above? No. If not, when did you commence doing business as a milk dealer under that name? Sept., 1933. Is the applicant successor in business to any other person or corporation? No. If so, state name of such person or corporation. ——.

3 (a). If applicant is an individual—Full name, —— ——; age, —; residence address (street and number, city and state): ——.

3 (b). If applicant is a partnership—Full names of all partners: ——; post office address (street and number, city and state); ——; age, —.

3 (c). If applicant is a corporation—In what State incorporated. N. Y. When incorporated? 1933. Principal [fol. 24] office, 80 Vernon Ave., B'klyn, N. Y. Authorized capital, 200 shares no par value. Capital paid in cash, $3,475.00.

Full name of	Post office address (Street and number, city and State)	Date of taking office
President: Bertha Silberman	691 Madison St., B'klyn, N. Y.	Immed.
Secretary: Benj. Reiss	433 Pulaski St., B'klyn, N. Y.	"

Directors: Above.

4. Do you purchase milk from (a) milk producers? No. (b) Any cooperative association? No. (c) Any other dealer? Yes.

5. Do you keep cows for the production of milk? No. If so, how many? ——.

6. From how many producers do you buy milk? None.

7. Do you now hold an unrevoked license from the Department under Article 21, entitling you to purchase milk from producers? No.

8. Have you filed a bond with the Department for the period ending August 31, 1934? No. If so, what is the amount of such bond? ——.

9. Location of every plant or station in New York State where milk or cream is received from producers, and name of manager in charge. (List plants—not producers. Attach additional paper if necessary.)

[fol. 25]

Name by which plant is known	Post office address of plant	County	Name of plant manager
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

10. Give below the name of each milk dealer or cooperative association from whom you are purchasing milk or cream. (Attach additional paper if necessary.)

Name: Supreme Milk Co.

Address: Perth Amboy, N. J.

Commodity purchased	Approx. daily amount	Price paid per cwt.
Bulk	200 qts.	Control Board
Bottle	900 "	"
H C	24 "	

11. Give below the name of each city and village where you sell milk.

Name of City: N. Y.
Permit from Health Officer (Yes or No): Yes.
Health Officer's Name: Dr. Rice.
Date Permit expires: Sept. 1934.

12. What disposition is to be made of the milk or cream purchased? (a) Resold, Yes. (b) Manufactured, No.

13. The maximum amount of milk received or handled in any calendar month since April 1, 1933 (exclusive of the amount used by the applicant for manufacturing milk products other than cream, condensed or concentrated milk not [fol. 26] packed in hermetically sealed cans, and exclusive of milk received outside of the State of New York and not distributed or sold within the State of New York) was received during the month of: March, 1934.

14. The following is a detailed statement of the milk, cream and condensed milk received during the month just mentioned:

(a) Fluid milk received from producers	..... lbs.
(b) Fluid milk of own production	..... lbs.
(c) Fluid milk received from dealers	43,775 lbs.
(d) Cream from producers, —— lbs. Average fat, —%. Milk equiv.	..... lbs.
(e) Cream from dealers, 536 lbs. Average fat, 40%. Milk equiv.	5,360 lbs.
(f) Condensed from dealers, —— lbs. Average fat, —%. Milk equiv.	..... lbs.
(g) Total received (in terms of milk)	49,135 lbs.
(h) Milk used for fluid milk, cream and bulk condensed and evaporated milk	.....
(i) Milk used for all other purposes	.....
(j) Milk received outside the State of New York and not delivered or sold in the state	.....
(k) Total of the two foregoing items	49,135
(l) Difference [item (g) less than item (k)]	.....
(m) Average daily amount of Item (l)	1,585

15. State experience of applicant (or of its officers, if a corporation) which qualify applicant to conduct business, giving names of concerns previously associated with. Max Silberman, Manager, formerly one of the officers of Silberman Dairy Co., Inc.

[fol. 27] (Dealers who produce all the milk which they sell need not answer quettions 16 to 32 inclusive)

16. Bank references as to the character and financial responsibility of the applicant. Banks—
Name: Mfg. Trust Co.
Town: B'klyn, N. Y.
Number and Street: 774 B'way, B'klyn, N. Y.

17. Other references—

Name	Town	No. and street	Business
Supreme Milk Co.	P. A. N. J.	....	Milk and Cream
Keimer Williams	Richmond Hill, N. J.	....	Cars and Boxes

18. The following statement must be brought to date and dated.

Financial Statement of Assets and Liabilities of Applicant as of Apr. 1, 1934

Assets

Cash on hand	$104.98
Cash in bank	1,107.90
Accounts owing by customers, good and collectible, not pledged or sold as per Schedule A	110.22
[fol. 28] Merchandise (not on consignment or conditional sale): How valued: Cost	9.24
Deposits	50.00
Total Quick Assets	1,382.34
[Machinery:]* (Cost, $——. Improvs., —— Depreciated (Deduct) ——)	211.78
Fixtures and other Equipment: (Cost, $—— Depreciated, $——)	202.92
Total Assets	

Liabilities

For Merchandise: Accounts owing, not due, as per Schedule A	941.31
Total Quick Liabilities	941.31
Other liabilities: (Describe) Res. for Depr.	358.37
Total Liabilities	1,299.68
Capital Stock Preferred	
Common	4,205.00

Net Worth

[Surplus and Undivided Profits]* Defic.	1,015.70
Total	4,488.98

Schedule A

State nature of accounts, how long outstanding, and if disputed, so state.

[fol. 29] Accounts Receivable

All good.

State nature of accounts and how long outstanding.

Accounts Payable

None Past Due.

19. Insurance on Merchandise, $——. On buildings, $——.

20. Net profit or loss last fiscal year (state which): $1,493.83.

21. Is the financial condition of the applicant, at the date of making this application, as good as indicated by the statement above? Yes.

22. The applicant are/is worth the net sum of Thirty-One Hundred Eighty-Nine dollars ($3,189.30).

[*Words and figures enclosed in brackets erased in copy.]

23. Is the applicant surety or endorser upon any bond, note, or other obligation, not included in foregoing statement of liabilities? If so, give names and amounts. No.

24. Has judgment been entered against applicant, upon which execution has been returned unsatisfied? No.

25. Is any suit, action or proceeding pending against applicant, which relates directly or indirectly to any pur-
[fol. 30] chase of milk or cream by such applicant? If so, state plaintiff's name and residence and the nature of such action or proceeding and the full title thereof. No.

26. Has applicant ever been convicted of a crime? No. If so, when, where, and in what Court, and what was the nature of the crime? ——.

27. The maximum value of the milk and cream that will be purchased by applicant from producers of milk in any one month during the license year ending March 31, 19—, is estimated at —— dollars ($——) and it is believed that such maximum will be purchased during the month of ——, 19—.

28. The maximum amount paid out by applicant to producers of mill and cream in any one month during the year immediately prior to making this application was . . . . None . . . . dollars ($——), and was paid during the month of ——, 19—.

29. The total value of milk and cream purchased by applicant from producers during the year immediately prior to the date of application was . . . . None . . . . dollars ($——).

30. On what days are payments regularly made for milk and cream? ——. Date, ——.

[fol. 31] 31. What periods of delivery are covered by payments made on each of the days listed in Item 24? ——.

32. Are any payments now past due? ——. If so, state amount and reasons, ——.

33. Do you agree not to buy milk or cream from or sell milk or cream to any unlicensed milk dealer in New York State? Yes.

34. Did you comply with all rules, price fixing orders and other orders of the Milk Control Board? Yes.

35. Do you agree to comply with all rules, price fixing orders and other orders hereafter made by the Commissioner? Yes.

36. Will the applicant handle any milk or cream produced elsewhere than in the State of New York? Yes.

(If this question is answered in the negative, Questions 37 and 38 need not be answered)

37. Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions? ——.

38. Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced with-
[fol. 32] out the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions? ——.

39. Has the applicant, or any milk dealer with which the applicant or any official thereof is connected, been notified to appear at a hearing before the Milk Control Board since April 10, 1933? Yes.

40. There is presented herewith a license fee in the sum of $25.00 in the form a check—money order. (Cross out term which does not apply.)

(Note: All license fees must be in the form of check or money order made payable to the Commissioner of Agriculture and Markets. Do not send cash.)

41. The applicant hereby represents that the statements made in this application and in the schedules accompanying it, which schedules are hereby made a part of this application, are true and correct.

Dated at B'klyn, N. Y., this 1 day of ——, 19—.

Application must be signed here: (Name of Applicant:) Mayflower Farms, Inc., by Bertha Silberman.

[fol. 33] Note: If co-partnership, firm name must be signed and each member must sign individually as well. If corporation, corporate name must be signed in full, with the officer's name and title on line below. Corporate seal must be impressed.

Execution of this application must always be acknowledged before a notary public or other officer authorized to take acknowledgments.

[fol. 34] EXHIBIT NO. 1—ANNEXED TO RETURN

June 18, 1934

(Copy)

State of New York

Department of Agriculture and Markets

Division of Milk Control

To Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York:

You are hereby directed to appear before the Commissioner of Agriculture and Markets of the State of New York at the offices of the Division of Milk Control of the Department of Agriculture and Markets on the 20th Floor of the State Office Building in the City of Albany, New York on the 18th day of June, 1934, at ten o'clock in the forenoon of that day, at which time and place you will be given an opportunity to be heard as to whether or not a license for the license year ending March 31, 1935, shall issue to you pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934).

You will be examined with respect to:

(1) The officers and directors of the Corporation and the power of control therein.

(2) The date of and the occasion that the present officers and directors took over the control of the applicant.

[fol. 35] (3) The business operations of the applicant since April 10, 1933, and more particularly with reference

to the revocation of license issued to said Corporation pursuant to the then Milk Control Law (Chapter 158 of the Laws of 1933), which said order was issued by the Milk Control Board on or about November 22, 1933, effective December 1, 1933.

(4) The sale of milk by you to stores at one cent below the minimum as fixed by the official orders of the Milk Control Board and that the Commissioner of Agriculture and Markets, or what is known to the trade in New York City as the "Unadvertised brand price."

It is further alleged that you have continued in a course of dealing of such a nature as to satisfy the Commissioner of your inability or unwillingness to properly conduct the business of receiving or selling milk;

That the sale of milk as aforesaid was in violation of said Article 25 and the official orders of the Commissioner duly enacted;

That you have since September 1, 1933, operated without a milk dealer's license in violation of former Article 25 of the Agriculture and Markets Law (Chapter 158 of the Laws of 1933) and the present Article 21 of that Law (Chapter 126 of the Laws of 1934).

[fols. 36 & 37] You are further directed to produce at said hearing, as hereinabove mentioned, any and all milk sheets, statements, papers, records and documents relevant to the allegations herein made, and

Take notice that it will be impossible to grant an adjournment except for extraordinary circumstances and in case of your failure to appear and answer, a determination will be made by default.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York; Kenneth F. Fee, Director, Division of Milk Control. (Seal.)

Dated and sealed at the City of Albany, New York, this 12th day of June, 1934.

[fol. 38] EXHIBIT No. 3.—ANNEXED TO RETURN

June 18, 1934

(Copy)

April 16, 1934.

To the Division of Milk Control, Albany, N. Y.:

The following is a list of stores (hotels or restaurants selling milk consumed on premises only not included) supplied with milk and/or cream by the undersigned milk dealer in the counties north of Rockland and Westchester.

Name of Dealer: Mayflower Farms, Inc.,

Address of Dealer: 80 Vernon Ave., B'klyn, N. Y.

Name of store operator (Write plainly)	Address			Daily deliveries	
	No. Street	City	Co.	Milk qts.	Cream qts.
Astir Holding Corporation	607 De Kalb Ave	B'klyn	Kings	40	3
E. Barden	766 Lafayette Ave	"	"	12	3
J. Bettina	66 Central Ave	"	"	24	2
B. Bitel	185 Green St	"	"	36	..
M. Blunstein	768 DeKalb Ave	"	"	24	..
C. Chafetz	253 Stockton	"	"	24	..
M. Chessner	340 Rodney St	"	"	12	..
A. Daniello	155 Lorimer St	"	"	18	..
DeKalb Coffee Pot Inc	835 DeKalb	"	"	80	1
Darshin	406 Lorimer	"	"	6	..
Dragon	81 Nostrand Ave	"	"	12	..
L. Taxon	356 Central	"	"	36	..
Gazinger	144 Roebling St	"	"	18	..
H. Glass	52 Bartlett St	"	"	24	..
S. Green	325 Manhattan Ave	"	"	24	..
H. Goldman	628 Wythe Ave	"	"	12	1
D. Ginet	16 Stagg St	"	"	6	..
P. Goldman	756 Myrtle	"	"	6	1
D. Kracov	43 Tompkins	"	"	12	..
J. Krizizlivski	157 Driggs	"	"	24	..
N. Kilchoaski	195 Green St	"	"	12	..

[fols. 39-44]

H. Koffler	63 Barlett	B'klyn	Kings	36	..
H. Larowitz	286 Pulaski	"	"	48	1
T. J. Lazaridio	6 Howard	"	"	40	1
S. London	208 Reid	"	"	24	..
H. Lukowski	234 Metropolitan	"	"	18	..
M. Mendelson	35 Howard	"	"	12	..
S. Millet	259 Nostrand	"	"	36	3
Nicar Restaurant Inc	894 Myrtle	"	"	40	1
S. Oser	22 Rockaway	"	"	24	..
F. Palma	218 No. 6th	"	"	12	..
Roth & Schalitz	338 Tompkins	"	"	24	..
Wm. Rosamyer	506 Wilson	"	"	6	..
Robertson	360 Central	"	"	24	..
I. Rubin	249 Ralph	"	"	12	..

Name of store operator (Write plainly)	No. Street	Address City	Address Co.	Daily deliveries Milk qts.	Daily deliveries Cream qts.
F. Sarnowski	26 Oakland	"	"	36	1
Shluker & Adelman	855 De Kalb	"	"	6	1
Steiner Bros	20 Central	"	"	60	..
R. Stufman	112 Ellery St	"	"	12	..
J. Weiniger	524 Graham	"	"	12	..
Wysocki & Barc	161 Grand St	"	"	12	..
W. Zurblis	104 Grand	"	"	12	..
G. Smith	745 Driggs	"	"	12	..
M. Ingwer	377 So. 2nd St	"	"	12	..
J. Zoller	367 S. 2nd	"	"	12	..
M. Trochiniki	126 Norman	"	"	24	..
H. Russak	321 Oakland	"	"	24	..
H. Krusch	175 Green St	"	"	12	..
A. Padilla	969 De Kalb	"	"	6	..
B. Lapidus	648 Central	"	"	24	..
C. Curcurato	165 Ralph	"	"	6	..
J. Hauft	43 Siegel St	"	"	24	..
M. Markel	63 Siegel St	"	"	24	..
Mary Kuc	288 Eckford	"	"	12	..

[fol. 45] EXHIBIT No. 6—ANNEXED TO RETURN

June 18, 1934

(Copy)

Puritan Dairy

Grade B Milk

Pasteurized at Perth Amboy, N. J.,

Not to be Sold After 12 Midnight, Monday

Perth Amboy, N. J.

TRANSCRIPT OF MINUTES OF HEARING HELD JUNE 18, 1934—ANNEXED TO RETURN

State of New York

Department of Agriculture and Markets

Division of Milk Control

Hearing held in the Department of Agriculture and Markets, 20th floor, State Office Building Albany, N. Y., at 2:00 P. M., June 18, 1934.

[fol. 46] This is a hearing on the Application of Mayflower Farms, Inc., No. 80 Vernon Avenue, Brooklyn, N. Y., for a Milk dealer's license pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

Appearances:

For the Department:

Mr. J. W. Harnach, Director, Traffic Bureau, Presiding: Robert G. Blabey, Esq., Counsel; Mr. Andrew H. Bell.

For the Applicant:

Mrs. Bertha Silberman, President of Mayflower Farms, Inc. Harry L. Marcus, Esq., Counsel.

Mr. Blabey: Is there any question about the notice?
Mr. Marcus: No; we will stipulate that we have received proper notice of this hearing.
Mr. Blabey: This paper that you hand me is a duplicate of the original notice on this hearing, Mr. Marcus?
Mr. Marcus: Yes.
Mr. Blabey: You are here in answer to that?
Mr. Marcus: Yes.
Mr. Blabey: I offer this notice in evidence.
Mr. Harnach: It will be received and marked Exhibit No. 1.

[fol. 47] Mrs. Silberman, being duly sworn, testified as follows:

Mr. Blabey (examination of Mrs. Silberman):

Q. Mrs. Silberman, you are an officer of the Mayflower Farms, Inc.?
A. Yes, sir.
Q. What officer are you?
A. I am President.
Q. How long have you been President?
A. Since the corporation's existence.
Q. When was the corporation organized?

Mr. Marcus: May I give you that information?
Mr. Harnach: Let her say, if she knows.
Mrs. Silberman: May, 1933.

Mr. Blabey (cont'g):

Q. You took office in May, 1933?

A. Yes, sir.

Q. Who are the other officers?

A. Well, we have no officers—I am the President and the Treasurer and Benjamin Reiss is the Secretary.

Q. When did Mr. Reiss take office?

A. When the others went out. I think it was in November, 1933..

Q. Were there others connected with the corporation other than Mr. Reiss and yourself?

A. No, nobody else.

Q. What do you mean when you say when the others went out Mr. Reiss took office?

[fol. 48] A. I mean Mollie Smith and Meyer Smith. They were formerly in.

Q. What was the connection of Meyer Smith?

A. He was President at that time—when the corporation was formed.

Q. Do I understand you correctly that he was President at the time the corporation was formed?

A. Yes, sir.

Q. Then, when did you take office?

A. I was at that time an officer also of the corporation.

Q. Were you President?

A. No, I was not. Meyer Smith was President at that time.

Q. What officer was you?

A. I was Secretary and Treasurer.

Q. Now, in May, 1933, when the corporation was organized who were the officers and directors?

A. When it was organized Meyer Smith was President, Bertha Silberman was Secretary and Treasurer.

Q. Bertha Silberman is you?

A. Yes, sir.

Q. And the directors at that time were who?

A. Mollie Smith.

Q. And others?

A. No.

Mr. Marcus: I don't think she understands you. There were three directors at that time.

Mrs. Silberman: I was and Meyer Smith and Mollie Smith were the directors.

[fol. 49] Mr. Blabey (cont'g):

Q. When did you become President?

A. In November, 1933.

Q. At the present time, are there any others connected with the corporation other than you and Mr. Reiss?

A. Abraham I. Jacofs.

Q. What is his official position?

A. He is one of the directors.

Q. Are there any other directors?

A. Well, Bertha Silberman, Benjamin Reiss and Abraham I. Jacofs.

Q. Did you make an application to the Department of Agriculture and Markets for a milk dealer's license for the current license year?

A. Yes.

Q. In the name of the corporation?

A. Mayflower Farms, Inc.

Q. Did you sign the application?

A. Yes.

Q. I show you an application for a milk dealer's license in the name of Mayflower Farms, Inc., signed on the fourth page, "Mayflower Farms, Inc., by Bertha Silberman," and I ask you if that is the application to which you refer, and if that is your signature on the last page?

A. Yes.

(Mr. Marcus examines the application.)

Mr. Blabey: I offer this in evidence, Mr. Director.

Mr. Harnach: It will be received and marked Exhibit No. 2.

[fol. 50] Mr. Blabey (cont'g):

Q. On this application, Mrs. Silberman, Exhibit No. 2 herein, you will note that it says that the directors are as above, and that Mr. Jacofs' name does not appear as one of the directors. Is that correct?

A. Yes. I didn't make this out. It was my accountant who made it out. He made this out and he gave it to me and I signed it. In fact, when he gave it to me I was sick at the time, and I ran down and I had it notarized.

Mr. Marcus: Will the presiding Commissioner please take judicial notice of the fact that under the Corporation

Laws of the State of New York, it is necessary that there be three directors to any particular corporation, and since there is an omission of one name on this particular application blank, it is presumed that there has been an omission made—not willfully done, which omission shall be supplanted by the testimony as given by the applicant.

Mrs. Silberman: That was his fault.

Mr. Blabey: That three directors idea of Mr. Marcus is just the reason why I am leading up to this.

Mrs. Silberman: That was not my fault.

Mr. Harnach: What is the accountant's name?

Mrs. Silberman: Philip Kastenbaum.

Mr. Harnach: His address?

Mrs. Silberman: I don't know.

[fol. 51] Mr. Blabey (cont'g):

Q. On this application the names of Meyer Smith and Mollie Smith do not appear.

A. No.

Q. What was the reason for Meyer Smith and Mollie Smith leaving the corporation as officers and directors?

A. There were differences about money matters and all that and they left.

Q. Was there any other reason?

A. No; it was mainly money matters.

Q. What differences over money matters?

A. They would not put more money into the business to keep it going.

Q. Are they relatives of yours?

A. Of mine?

Q. Yes.

A. Not of mine.

Q. Relatives of Mr. Reiss?

A. No.

Q. Or Mr. Jacof's?

A. No.

Mr. Harnach:

Q. Are they any relatives of Mr. Maxwell Silberman?

Mrs. Silberman: A. Yes. Mr. Smith is a cousin of Mr. Maxwell Silberman.

Q. Is Maxwell Silberman your husband?

A. Yes.

[fol. 52] Mr. Blabey (cont'g):

Q. I notice on the application the date of taking office of yourself and Mr. Reiss is given as "immediately". Will you explain that, please?

A. Immediately. Well, when Mr. Meyer Smith resigned, we took it right over. I took his share of the business right over. Is that what you want to know?

Q. The application is not dated, but it was acknowledged on the 28th day of April apparently, and was received by the Division of Milk Control on the 30th day of April, so that does the word "immediately", in the column given for the date of taking office, refer to those dates?

A. Not the dates. You mean the dates when that was delivered to me. No "immediately" means the day when Meyer Smith resigned and I took his office.

Q. Now, then, other than these people that you have mentioned, is there any one else connected with the corporation in any way?

A. No.

Q. Who has charge of the office?

A. I have charge of the office.

Q. Do you keep the records and books and accounts?

A. I do.

Q. How many routes have you?

A. Just one.

Q. Who handles that?

A. Maxwell Silberman.

Q. What are his duties?

[fol. 53] A. He is the driver and collector.

Q. He collects the bills, does he?

A. Yes.

Q. He delivers the milk to the customers?

A. Yes.

Q. To what class of trade do you deliver milk?

A. Store trade.

Q. All stores?

A. Yes.

Q. And does Maxwell Silberman contact the stores?

A. What does that mean? I didn't get it.

Q. Does Mr. Maxwell Silberman come in contact with the stores and take care of that business?

A. Yes.

Q. Does he solicit accounts—new business?

A. Yes.

Q. Has he been an officer or director of the corporation at any time?

A. No.

Q. Since the organization of the corporation, have you been continuously delivering milk to stores?

A. Yes.

Q. How many store accounts have you?

A. About 50.

Q. I show you a paper dated April 16, 1934, directed to the Division of Milk Control, purporting to be a list of stores to which the Mayflower Farms, Inc., deliver milk. Will you examine that paper and tell me what it is, please? [fol. 54] A. I wrote that.

Q. And what is it?

A. That is a list of the stores to which we deliver milk.

Q. I offer this in evidence.

Mr. Harnach: It will be received and marked Exhibit No. 3.

Mr. Blabey (cont'g):

Q. How many stores are you delivering at the present time?

A. I cannot be exact. About 54 or 53. Don't know exactly. Yesterday we lost one. I cannot be exact.

Q. Approximately?

A. About in the 50's.

Q. From whom do you purchase your milk?

A. From the Supreme Milk & Cream Company.

Q. Where is that located?

A. Perth Amboy, N. J.

Q. Approximately how much milk have you been purchasing daily?

A. It varies according to the weather. Some days 70, 80, 85.

Q. Cases?

A. Cases.

Q. That is what grade?

A. Grade "B".

Q. All Grade "B" milk?

A. Yes.

Q. What price do you pay the Supreme for Grade "B" Milk?

[fol. 55] A. 6⅛ cents.

Q. 6⅛ a quart?

A. Yes. That includes trucking and all.

Q. That milk when you take title to it from the Supreme is already pasteurized, bottled and ready for delivery?

A. Yes.

Q. At what price do you sell the milk to the stores?

A. Just now 9¾ cents.

Q. What price did you formerly receive?

A. 9 cents up to June 11th.

Q. June 11, 1934?

A. Yes.

Q. Do you know whether or not Mayflower Farms, Inc., made application to the former Milk Control Board for a milk dealer's license for the year ending March 31, 1934?

A. Yes.

Q. And at the time the application for license was made do you recall whether or not it was granted by the Milk Control Board?

A. It was not granted.

Q. And do you have a license for the year ending March 31, 1934, issued by the Milk Control Board at any time?

A. I had a license in 1933.

Q. And what license was that?

A. It was issued—do you want the date?

Q. Yes.

A. September 6, 1933.

[fol. 56] Q. Was that a Milk Board license, or a temporary permit?

A. It was a Control Board permit. It was a license. I have the number of the license here—No. 3016.

Q. After the license was issued, were you called before the Milk Control Board for a hearing?

A. Yes.

Q. When was that—do you remember?

A. I don't remember the date.

Q. Do you remember what the result of that hearing was?

A. At that time they said they were going to revoke it.

Q. Do you know whether an order of revocation was ever issued by the Milk Control Board?

A. Yes.

Q. Will you examine that paper, and tell me if that is a copy of the order issued by the Milk Control Board.

(Paper presented to Mrs. Silberman for inspection.)

A. Yes.

Q. You received the original, did you?

A. Yes.

Q. I offer that in evidence.

Mr. Harnach: Any objection, Mr. Marcus?

Mr. Marcus: No.

Mr. Harnach: It will be received and marked Exhibit No. 4.

[fol. 57] Mr. Blabey (cont'g):

Q. After the issuance of this order Mrs. Silberman, which is dated November 22, 1933, was a license ever given to you from the Milk Control Board to act as a milk dealer?

A. No.

Q. That is all.

Mr. Harnach (examines Mrs. Silberman):

Q. Did you continue to purchase and sell milk after you received this official order of revocation?

A. Well, we got a court order, I think it was.

Q. Did you continue?

A. Yes; I continued.

Q. Where is the office and premises of the Mayflower Farms, Inc.?

A. 80 Vernon avenue, Brooklyn, N. Y.

Q. Will you describe, for the record, what is at those premises in the way of property?

A. I had my office there upstairs, and downstairs I have the truck and ice box, the cases, the cans, machine——

Q. A storage?

A. For what?

Q. Where you store cases?

A. Yes—for empty cases and milk cans—just a large loft.

Q. What do you own in the way of delivery equipment?

A. Delivery—well, I own a truck.

Q. Is that truck stored on the premises at No. 80 Vernon avenue, Brooklyn, when not in use?

[fol. 58] A. Yes.

Q. When the corporation was first formed in May, 1933, how many stockholders did you have?

A. Stockholders—two.

Q. Who were they?

A. Meyer Smith and Bertha Silberman.

Q. How much money was invested in the corporation at that time?

A. We didn't put all the money into it right away. We put in some of it, and as we went on we put more into it.

Q. How much did you start with?

A. I think it was about $2,500. I don't remember the exact amount.

Q. About $2,500?

A. I mean about that much.

Q. About how much did Mr. Meyer Smith put in?

A. He put in half of that. Whatever we put in, he put in half.

Q. In what did you invest this money?

A. In bottles, cases, fixing up the place, fixing the office up, buying the truck, stationery, building the ice box.

Q. Did you have any customers at the time you started business?

A. I had promises that they were going to take milk from us when I started. Since I got started they took it.

Q. How did you get these promises?

A. Old friends of ours, old customers that we had for years back.

[fol. 59] Q. Did you get these promises by going around and soliciting trade after you decided to go into the milk business?

A. Well, when they heard that we were going in—those that heard that we were going in said that we could have their business as soon as we got started.

Q. Had you been engaged in the milk business as a dealer at any time before May, 1933?

A. I was not in the milk business, but Mr. Maxwell Silberman was born and brought up in the milk business all his life.

Q. Was it Mr. Maxwell Silberman's money which was invested in this, or your own?

A. Mine.

Q. Aside from you and Mr. Reiss, the third director is Mr. Abraham I. Jacofs. In what way is he related to you?

A. He is my brother.

Q. Would you mind stating for the record the members of Mr. Maxwell Silberman's family, beginning with his mother?

Mr. Marcus: Objection, on the ground that this question, if the Commissioner please, is entirely irrelevant and immaterial in this matter. We are here for the purpose of the Mayflower Farms, Inc.

Mr. Harnach: I understand. What good does it do you to object to a question that I ask?

Mr. Marcus: I do not see what the relationship of some outside persons has to do with this business.

[fol. 60] Mr. Harnach: I overrule your objection and give you an exception.

Q. What is his mother's name?

Mrs. Silberman: A. Annie Silberman.

Mr. Harnach (cont'g):

Q. Is his father dead?

A. Yes.

Q. How many children did Annie Silberman have?

A. She had seven.

Q. Will you name them?

A. Maxwell Silberman, Irving Silberman, Ben Silberman, a daughter, too, Rose Silberman, Sam Silberman, Kenneth Silberman and Jerome Silberman.

Q. How many are living—are they all living?

A. Yes.

Q. Is Mrs. Annie Silberman engaged in business as a milk dealer?

A. Of the Mayflower Farms?

Q. Is she engaged in the business of a milk dealer?

A. Of the Camron Farms.

Q. How do you spell it?

A. Camron.

Q. Is that a corporation?

A. I guess so.

Q. Are any of the others of Mr. Maxwell Silberman's brothers or sisters engaged in the milk business——

[fol. 61] A. Mr. Benjamin Silberman, of Shirben Farms.

Q. Is that a corporation?

A. Yes.

Q. Are any of the others?

A. No.

Q. Did Mr. Irving Silberman engage in any milk business at any time?

A. He was.

Q. What does he do now?

A. I don't know. He is in the Camron—manager or something. I have no interest in Camron Farms at all.

Q. Do you come in contact with Mrs. Annie Silberman frequently?

A. Yes.

Q. Do you know the officers of the Camron Farms?

A. No, I don't.

Q. Who did you say was manager of the Camron Farm's business?

A. I think so—I am not sure.

Q. Who is?

A. I think Irving Silberman—I don't know—I really don't know.

Mr. Harnach: That is all.

Mr. Marcus: I move at this time, Mr. Commissioner, to strike out all of the evidence given as of no material effect in the application for the year 1934. In conformity with the new Milk Control Law, which is now in effect, no evidence [fol. 62] has as yet been shown where the Mayflower has forfeited its right for a permit.

Mr. Blabey: I ask the director to reserve any decision as to whether or not any rights have been forfeited. It is my contention and allegation naturally that I have made out a case, and I think it has been shown that the applicant operated without a license during the past year, and that in itself is sufficient to deny the application for a license. I do not think, in the case I have made up to this point, it should be dismissed.

Mr. Harnach: The motion to dismiss is denied.

Mr. Marcus: Exception.

Mr. Blabey: As to the evidence, may I say that these family connections may be very material on an application of this kind, particularly in view of the fact—if it can be shown that some of these other corporations made applica-

tion for a license—before the Milk Control Board on hearings.

Mr. Marcus: At this time I move to strike out the testimony or comment made by counsel for the Milk Control Division, due to the fact that his statement is a conclusion, and there are no facts or evidence bearing out that which he says about the family affairs of the business. There is nothing in the evidence to show that and such statement would only tend to mislead the Director.

[fol. 63] Mr. Blabey: I can introduce in evidence the folder of the Camron Farms, and I suppose I can ask witness to identify those individuals.

Mr. Harnach: I will dismiss the motion and give you an exception.

Mr. Blabey: I will introduce at this time a copy of the order of the Appellate Division dismissing a certiorari order in the matter of the application of the Mayflower Farms, Inc.

Mr. Harnach: Any objection, Mr. Marcus?

Mr. Marcus: I might add that that particular dismissal, due to the fact that the case has been dismissed, was due to the procedure on the part of the attorney who represented the company at that particular time.

Mr. Blabey: I think the order will speak for itself.

Mr. Harnach: It will be received and marked Exhibit No. 5.

Mr. Blabey: I might say that this mention of the family connections by me was in reference to sub-division j of section 258-c of the law.

Mr. Harnach (examines Mrs. Silberman):

Q. Who is Jerry Silberman?

Mrs. Silberman: A. A brother-in-law.

[fol. 64] Q. A brother of Maxwell Silberman?

A. Yes.

Q. Who is Helen Silberman?

A. She is the wife of Irving Silberman.

Q. Is there any Isadore Silberman ?

A. That is his name—it is either Irving or Isadore.

Q. Which is the correct name?

A. I don't know.

Q. Who is Rae Price?

A. I don't know.
Q. Do you know Ruth Rosenthal?
A. No.
Q. Or Beatrice Wishnew?
A. No, I don't know her.

Mr. Marcus: Again I make the motion that all of this questioning is out of place as incompetent, irrelevant and immaterial and has no bearing on this particular notice of hearing to the Mayflower Farms, Inc., insofar as the business operations of the applicant and the sale of milk to stores as specified in the formal notice of this hearing, served upon the applicant, the Mayflower Farms, Inc. All other matters than those specified in the notice of hearing are incompetent, irrelevant and immaterial, and has nothing to do with this particular case.
Mr. Harnach: Objection overruled.
Mr. Marcus: Exception.

[fol. 65] Mr. Marcus (examination of Mrs. Silberman):

Q. Mrs. Silberman, let us go back to the time when this corporation was formed, to clear up just how the formation came about, and what occurred between members of the corporation. When this corporation was formed, who were the persons who were officers and directors and investors of money in this corporation?
A. Meyer Smith, President. I was the Secretary and Treasurer at that time.
Q. What was Mollie Smith?
A. She was one of the directors.
Q. Is she related to Meyer Smith?
A. She is his wife.
Q. At that time, did you put any money in this business?
A. Yes.
Q. Did you put in an amount equal to Meyer Smith?
A. Yes.
Q. At a later date, was some one's share bought out?
A. Meyer Smith's share was bought out. I bought Meyer Smith's share.
Q. Did you pay him in cash or in notes?
A. All cash.
Q. You became the sole stockholder of this corporation?
A. Yes.

Q. Were you the only one with money in this corporation?

A. Yes.

[fol. 66] Q. And the reason that he got out—what was the reason he wanted to get out of the business?

A. We needed more money to invest and pay for different things. He didn't want to invest any more money and he withdrew and I took it over.

Q. When you say "we", who do you mean?

A. Mayflower Farms, [illegible].

Q. Did you pay him from Mayflower Farms, Inc.?

A. I did.

Q. You said that you were purchasing milk from the Supreme Milk & Cream Company—is that so?

A. Yes.

Q. Do you know whether the Supreme Milk Company sell an advertised or unadvertised brand of milk?

A. Unadvertised.

Q. It is labeled——

A. Yes.

Q. I show you this cap, which reads "Puritan Dairy, Grade B Milk, Pasteurized at Perth Amboy, N. J. Not to be sold after 12 midnight, Monday, Perth Amboy, N. J." I show you this cap and ask you whether it is a sample cap of caps on milk sold by you to your customers?

A. Yes.

Q. I wish to offer this in evidence.

Mr. Harnach: It will be received and marked Exhibit No. 6.

[fol. 67] Mr. Marcus (continues examination):

Q. Do you know other people who are buying milk from the Supreme Milk Company?

A. Bellach Farms, Shirben Farms, Lima Dairy.

Q. Do you know any others?

A. Camron Farms, Glen Dale Dairy.

Q. Do you know whether all of these people that you have mentioned are selling the milk as an advertised or unadvertised brand of milk?

A. Unadvertised brand of milk.

Mr. Marcus: I wish the Commissioner would take judicial notice of the fact that the Division of Milk Control has

records which will show that these concerns enumerated, and all the other concerns which are purchasing milk from the Supreme Milk Company are all purchasing that milk from an unadvertised brand of dealer, and are selling it as an unadvertised brand.

Mr. Harnach: We would like to have you bring out the point at which this milk becomes the property of the Mayflower Farms, Inc. Where does title pass?

Mr. Marcus: What significance could that be?

Mr. Harnach: I want to know——

Mr. Marcus: You want to know if f. o. b. Perth Amboy, N. J., etc. She says that she pays 6⅛ cents, which includes transportation to her door.

Mr. Harnach: In other words, it is not her milk until it is delivered to her.

[fol. 68] Mrs. Silberman: This price just quoted—6⅛ cents—that was prior to June 11th. I have no price after that yet.

Mr. Marcus (cont'g):

Q. Now, Mrs. Silberman, did you have a permit for the year 1933 from the New York City Health Department?

A. Yes.

Q. Have you a permit for 1934 from the New York City Health Department?

A. I have.

Q. You have a New York City Health Department — for the year 1934. What is the number of that permit, and when was it issued?

A. March 13, 1934, for six months, and the license number is 387080.

Q. In the year 1933, which was last year, you made application and applied for a license from the New York State Milk Control Board. At that time, did you send them a check as a fee for the license?

A. Yes.

Q. Did they receive that check?

A. Yes.

Q. They accepted your money?

A. They accepted.

Q. Now, you say you received their license in the year 1933?

A. Yes.

Q. Can you tell me when you actually received that license, regardless of the date on the license? When did you actually receive it?

[fol. 69] A. From the Control Board?

Q. Yes.

A. For 1933, do you mean?

Q. Let me put the question another way.

A. I received it before we had our truck rolling, is that what you mean?

Q. Let me ask you another question? Did you receive this license before you received a notice of a hearing to revoke your license last year, or after you received the notice.

A. I got the permit before.

Q. Now, coming to your family affairs. Are you on speaking terms with Annie Silberman, your mother-in-law?

A. No.

Q. Do you ever go to the Camron Dairy's business to visit her there?

A. No.

Q. Were you ever there?

A. I was there about four or five years ago.

Q. Were you there in the last year?

A. Not for about four years now.

Q. When you say they owe you——

A. They owed me at that time.

Q. There was a controversy about that?

A. Yes.

Q. There was a strained relationship?

A. Yes.

Q. Have you a strained relationship with Irving Silberman?

A. Yes.

Q. With his wife?

[fol. 70] A. Yes.

Q. How about the remainder of the members of the family such as you have mentioned?

A. My brother-in-laws?

Q. Do you see them very often?

A. Just when they pass my place; they come in to see me.

Q. Have you any money in the Camron business?

A. No.

Q. Have you any money invested in any business—milk business, other than the Mayflower Farms, Inc.?

A. No.

Q. Has any other person, besides you, invested any monies at the present time? That is, any investment up to the present time in the Mayflower Farms?

A. Right now, I have all the investment in the Mayflower Farms, Inc.

Q. About how much money?

A. Between $4,500 and $5,000—maybe a little more. Over $5,000.

Q. In the districts where you sell your milk, that is, the Mayflower Farms sells its milk, on those particular streets, or in the same stores, are there other dealers that also serve milk from Perth Amboy?

A. Yes.

Q. Do you mean on the same street or identical stores?

A. Not in the same stores, but on the same street.

[fol. 71] Q. The same kind of bottle?

A. We have our own bottles.

Q. The labelling of the milk?

A. Yes.

Q. The same identical label?

A. Yes.

Mr. Harnach:

Q. Is there any name on the bottle?

A. Mayflower Farms.

Mr. Marcus (cont'g):

Q. In other words, the milk is produced and pasteurized by the Puritan Milk Company, Perth Amboy, N. J.

A. Yes.

Q. And all you supply is the empty bottle?

A. Yes.

Q. Do they label the milk and ice it and deliver it to you, and you just distribute it?

A. That is all.

Q. Do you know whether any milk is being sold in the City of New York today to any city institutions for 8 cents?

A. Yes.

Q. Who is selling it?

A. Those milk stations.

Q. You refer to New York City stations?

A. Yes.

Q. Are they competing with you?

A. They certainly are.

Q. Do any of your customers buy milk from these stations?

[fol. 72] A. I don't know whether they buy directly, but they don't take as many cases from us as they did before.

Mr. Blabey: I am not sure that it is relative, at the same time I have no objection as to its going in. I am not convinced as to the relevancy of the testimony.

Mr. Marcus: I wish to show that the New York State Milk Control Board cannot properly enforce its laws, insofar as the price situation in New York City is concerned, if any governmental agency of the City of New York is going to violate the orders of the New York State Milk Control Board. I know, of my own knowledge, that numerous complaints have been made by various dealers that this situation has made it a hazard, and that the price structure promulgated by the Board is seriously handicapped and perhaps in grave jeopardy.

Mr. Harnach: Is the quantity of milk being sold by the City of New York increasing daily?

Mr. Blabey: It can have no particular relevancy at this time on this hearing—as regards this applicant, as all sales brought out on direct examination have taken place before the City of New York began to sell this milk. In any event, so many factors have come into play at this time, I don't see how it is proper before a hearing held on the applica-
[fol. 73] tion of the Mayflower Farms, Inc.

Mr. Harnach: I am disposed to accept some information.

Mr. Blabey: I have to object on that.

Mr. Marcus (cont'g):

Q. Let me go back to something said earlier in the hearing. You said you paid 6⅛ cents for milk. Was that prior or after the last order went into effect with the price increase of one cent a quart, which one cent was divided one-half to the farmer, one-quarter to the dealer, and one-quarter to the grocer?

A. That was before.

Q. In other words, since the last order, you don't know what the price will be that will be charged to you by the Perth Amboy Company?

A. I will know tomorrow.

Q. What price do you get for your milk when you sell it to the stores?

A. 9¾ cents.

Q. What did you get before this order went into effect?

A. 9 cents.

Q. Has the Milk Control Board ever sent anybody to check your records to see if that was so?

. About two weeks ago—they looked over all of my books.

Q. You find it easy to get customers at that price?

A. No, I don't.

[fol. 74] Q. Why cannot you get customers at that price?

A. Because some of the others are getting it for 8 and 7¾ cents right now. I won't mention any names.

Mr. Harnach:

Q. Are you losing any customers as the result?

A. Yes. We lost a customer yesterday.

Q. Have you gained any customers?

A. No; we are losing.

Mr. Marcus (cont'g):

Q. How much milk do you sell a day?

A. It varies—about 75, 80 or 85 cases.

Q. How many drivers have you?

A. Mr. Maxwell Silberman and some one to help him.

Q. Your husband?

A. Yes.

Q. You have one route?

A. Yes.

Q. Did you file an application for the year 1934?

A. Yes; I did.

Q. Did you send your check with it?

A. I did.

Q. The check was accepted?

A. It was accepted.

Q. The application—you don't know about that?

A. My check came back.

Q. Was your application accepted? Were you informed [fol. 75] that a license would be issued at any time?

A. No.

Q. Is there anything else that you wish to add to the questions that I have put before you?

A. I just want to tell the Commissioner that we are having a hard time to keep in business. It seems as if the big fellows are trying to put us out. Certain stops where we were selling six cases a day they cut us down—just for friendship's sake they still hold on to one case. It seems as if the big fellows can do the dirty work and get away with it, and the little fellow just has to get out of it. In fact, I was talking to the Milk Board Inspectors and they told me that they know as a fact that they are all chiseling and that they are all cutting the price and are trying to shove the Mayflower out and all the little dealers, and they have their association and are working against those that are not in it.

Mr. Marcus (cont'g):

Q. Did any one ever ask you to join an association and say "if you pay us you will not be molested"?

A. Yes, but I don't want to mention any names. Certain milk dealers did it. At the head of the association are like Louis Gimbel. Some one called me up—and told me they would push me out of business, and some one that is taking care of the milk dealers' association, Mr. Neidner—he said the milkmen have it in for me, and they are trying to get us out. They are putting in all the complaints they get.

[fol. 76] Mr. Blabey:

Q. When did you start buying milk from the Supreme, Mrs. Silberman?

A. I don't know the exact date, but we were dealing with Honeybrook Farms, and when they went out of business—a few days before—we were told they were going out of business—we started with Supreme.

Q. Can you remember the approximate time that that was?

A. How long ago?

Q. Yes.

A. I don't know the exact date. It should be about five months ago, or so.

Q. When the corporation was first organized in May, 1933, from whom did you buy milk then?

A. Honeybrook Farms.

Q. From May, 1933, to the time that Honeybrook went out of business, you purchased from Honeybrook?

A. Yes.

Q. Since that time you have been purchasing exclusively from Supreme?

A. Yes.

Q. When did you sell the first quart of milk, do you recall, under the name of the "Mayflower Farms"?

A. Since I got my license. I think the beginning of September. We were waiting for the license.

Q. Had you sold any milk in the name of "Mayflower Farms, Inc." before September, 1933?

[fol. 77] A. No. We did not sell any until we got the license.

Q. That license is a Health License or Milk Board License?

A. Milk Board license. The health license we got before.

Q. Have you a health permit at the present time from New York City?

A. Yes. I gave you the number of it.

Mr. Harnach:

Q. Was the application for license which you submitted for Mayflower Farms made out by the same person who made out the application for the Camron Farms?

Mrs. Silberman: A. I don't know.

Mr. Marcus: You can answer that question.

A. The same person—you mean, who signed it?

Mr. Harnach:

Q. Yes.

A. I think the accountant is the same fellow. He is for Shirben, also.

COLLOQUY

Mr. Marcus: I might say at this time that Mr. Manley, who is attorney for the Milk Control Board on two previous occasions has himself stated that Section 258, or last year it was called in the old law, Section 317, subdivision "c," and he has said on two occasions, records of which are now [fol. 78] in the courts of this state, that he thought that this particular section was unconstitutional, and I am inclined to agree with him, for this reason. I don't think it

was the intention of our Legislature to prevent any person from conducting a legitimate business, and it certainly would be a flagrant violation and restraint of trade were any law to be interpreted in such fashion as to prevent anybody from starting in business, and it certainly would be a grave discrimination if we were to penalize such person because he starts in business. It says you must sell a product which is not an advertised brand of milk for a cent more than your competitor who is handling the same brand of milk, and that the grocery, where the milk is delivered by a dealer who is a little later in the business, and the consumer will be penalized to pay one cent more for the same identical milk. That is my opinion, and I might say that it is in line with what Mr. Manley has said. That particular section, I think, is unconstitutional. I don't think it is right. I think it is discriminating and tends to form a monopoly for those select few who might have been in business prior to a certain date. If they handle an advertised brand, they should sell at the advertised brand price, but in view of the fact that there are competitors in the same [fol. 79] vicinity as stores sold by this witness, I don't see why she should be penalized to sell milk for one cent more than somebody else.

Mr. Blabey: If the section is unconstitutional, as you allege, your client is not penalized, is she, for the reason that she would be compelled in any event to charge a cent more.

Mr. Harnach: The point which Mr. Blabey makes, if the section is unconstitutional, there is no privilege—therefore, your client and others are selling under prescribed prices.

Mr. Marcus: I cannot say otherwise unless I say a falsehood. I say we are selling milk at the same price as any other dealer in the City of New York should be selling if he were selling at unadvertised brand prices. There is an order in existence by this Board, which says that only a select few of the dealers are classed as having advertised brands of milk—Borden, Sheffield, Dairymen's League, Renken. Never has there been an order issued making any other brand of milk an advertised brand of milk.

Mr. Blabey: Do you claim that the United States District Court in the case of Borden's Farm Products against the Commissioner of Agriculture and Markets upheld the unconstitutionality of this case?

[fol. 80] Mr. Marcus: There the Court held that it was not discriminatory against the company which was selling an actual advertised brand of milk, but here you are trying to penalize a person who is selling an unadvertised brand of milk to sell for the advertised brand price.

Mr. Blabey: If the section should be declared unconstitutional, as you allege it is, your client is not penalized because in that event she will charge a cent more.

Mr. Marcus: Let me say this: You might say to me, my client is getting a cent more. You, with your experience sitting here at these hearings, know how difficult it is to get that minimum price, not saying anything about getting more than the minimum price. That is what you people want them to do. They complain that they cannot get the minimum. Therefore, their minimum price is really the maximum price. I think there is a case—the Hegeman case—that particular matter is now pending in the United States Supreme Court. There is also another case I would like to call to your attention, but I cannot put my finger on it.

Mr. Harnach: The hearing is adjourned and the decision is reserved.

[fol. 81] MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: J. W. Harnach.
To: Mr. Robert G. Blabey, Assistant Counsel.
Date: July 3, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y.

Pursuant to your verbal request therefor, I submit recommendation based upon hearing held June 20, 1934 (not June 18, 1934, as shown on transcript), on above corporation's application for milk dealer's license.

Applicant was incorporated on May 27, 1933, and on April 10, 1933, was not engaged in the business of purchasing and handling milk not having a well-advertised trade name in the City of New York; nor is it shown to be a successor to any person possessed of the privilege provided by Section 317 (c), Chapter 158, Laws of 1933, and Section 258-q, Chapter 126, Laws of 1934.

It appears that the applicant has at all times sold an unadvertised brand as though entitled to the aforesaid privilege. The Milk Control Board rules that it was not entitled thereto, and on November 22, 1933, revoked license No. 3016, issued September 6, 1933, revocation to become effective December 1, 1933.

[fol. 82] Applicant has continued to sell an unadvertised brand under the prescribed minimum price, which seems to provide cause for refusal to grant a license under subdivision (k), Section 258-c, Chapter 126, Laws of 1934.

J. W. Harnach.

JWH:MC.

MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: Robert G. Blabey, Assistant Counsel.
To: Kenneth F. Bee, Director.
Date: July 3, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y.

I am attaching hereto recommendation of Director Harnach in the Matter of Application of Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y., for a Milk Dealer's License pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

Robert G. Blabey.

RGB/MEW.

[fol. 83] MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: Mr. Fee.
To: Mr. Blabey.
Date: July 7, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Ave., Brooklyn, N. Y.

After reviewing Mr. Harnach's memorandum of July 3, in re the above matter, to which you also refer in your

memorandum of the same date, and after having discussed the matter with Mr. Manley, I am of the opinion that the application of Mayflower Farms, Inc., should be denied.

Will you please prepare an order denying such application.

Kenneth F. Fee, Director.

KFF:WG.

Order prepared and sent Registered Mail—7/9/34.

R. G. B.

[fol. 84] OFFICIAL ORDER DENYING PETITIONER'S APPLICATION FOR LICENSE, DATED JULY 9, 1934—ANNEXED TO RETURN

State of New York

Department of Agriculture and Markets

Division of Milk Control

In the Matter of the Application of MAYFLOWER FARMS, INC., 80 Vernon Avenue, Brooklyn, N. Y., for a Milk Dealer's License Pursuant to the Provisions of Article 21 of the Agriculture and Markets Law.

An application for a Milk Dealer's License pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934), having been made to the Commissioner of Agriculture and Markets by Mayflower Farms, Inc., of No. 80 Vernon Avenue, Brooklyn, N. Y., and due and proper notice of hearing on said application having been given, and said Mayflower Farms, Inc., having appeared before the said Commissioner on the 18th day of June, 1934, by Harry L. Marcus, Esq., its counsel, and Mrs. Bertha Silberman, its president, and said hearing having been duly held and due deliberation having been had and just and sufficient cause having been found; [fols. 85-87] It is hereby ordered that the said application of Mayflower Farms, Inc., for a Milk Dealer's License as aforesaid be and the same hereby is denied.

Dated at Albany, New York, this ninth day of July, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York. Kenneth F. Fee, Director, Division of Milk Control. (Seal.)

[fol. 88] IN SUPREME COURT OF NEW YORK, COUNTY OF ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that the above named petitioner-appellant, Mayflower Farms, Inc., hereby appeals to the Court of Appeals of the State of New York from the order of confirmation of the Appellate Division of the Supreme Court, Third Department, dated November 2, 1934, and entered in the office of the Clerk of the County of Albany on November 3rd, 1934, which order confirms the determination of the respondents and their order dated July 9, 1934, which denies the petitioner-appellant's application for a license as a wholesale milk dealer for the license year ending March 31, 1935, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, and from each and every part of said order of confirmation and said determi-
[fol. 89] nation and from the whole thereof.

Dated, Albany, N. Y., December 8th, 1934.

Yours, etc., Seymour Ellenbogen, Attorney for Petitioner-Appellant, Office and Post Office Address, 75 State St., Albany, N. Y.

To Henry S. Manley, Esq., Attorney for Defendants-Respondents, State Office Bldg., Albany, N. Y., and —— ——, Clerk of the County of Albany.

[fol. 90] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

In the Matter of the Application of MAYFLOWER FARMS, INC., Petitioner,

for a Certiorari Order against

CHARLES H. BALDWIN, Commissioner of Agriculture and Markets of the State of New York, and another, Respondent

ORDER OF CONFIRMATION

The above entitled certiorari proceeding having duly come on for argument, and the Court having heard argu-

ment on behalf of Seymour Ellenbogen, Esq. (Bernard Ellenbogen, Esq. of counsel) for the petitioner, and having heard Henry S. Manley, Esq., for the respondent, and due deliberation having been had, it is hereby

[fol. 91] Ordered that the determination be confirmed with ($50.00) dollars costs and disbursements.

Rhodes, Crapser and Heffernan concur.

Hill, P. J., and Bliss, J., dissent.

John S. Herrick, Clerk. (Seal.)

A true copy.

John S. Herrick, Clerk.

Entered November 3, 1934.

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION EXCEPT DISSENTING MEMORANDUM BY HILL, P. J.

STATE OF NEW YORK,
City and County of Albany, ss:

Seymour Ellenbogen, being duly sworn, says:

I am the attorney for the petitioner-appellant named in this certiorari proceeding and am familiar with all the proceedings herein.

No opinion was delivered by the Appellate Division, Third Department, on confirming the determination of the respondents herein, except the following decision and dissenting memorandum by Mr. Presiding Justice James P. Hill:

[fol. 92] Determination confirmed, with fifty dollars costs and disbursements.

Rhodes, Crapser and Heffernan, JJ., concur.

Bliss, J., dissents.

Hill, P. J., dissents, with a memorandum:

HILL, P. J.:

I dissent. This petitioner began business as a milk dealer in the City of New York on May 27, 1933. The statute in effect requires that a dealer beginning business after April

10, 1933, shall sell its milk for one cent a quart more than a dealer who was in business before April 10, 1933, received for the same grade of milk. This as effectively prevents a person from beginning business as though the statute in terms contained a direct prohibition. The reasonableness of the regulations prescribed by the Legislature in the milk emergency is subject to court review. A court may consider "the legitimacy of the conclusions drawn from the facts found". (People v. Nebbia, 262 N. Y. 259, 268.) The facts before the Legislature did not justify giving a monopoly to dealers in business on April 10, 1933. Petitioner's constitutional right to engage in a lawful business has been abridged.

Seymour Ellenbogen.

Sworn to before me, this 26th day of December, 1934. Lillian D. Campagna, Com'r of Deeds, Albany, N. Y.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] IN COURT OF APPEALS OF NEW YORK

In the Matter of MAYFLOWER FARMS, INC., Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al., Respondents

Constiutional Law—Police Power—Milk Control—Statute Permitting Class of Milk Dealers, Engaged in Business at Specified Date, to Sell Milk at a Price Lower Than Dealers of Same Class Who Entered Business Thereafter are required to Charge, Valid

The provision of section 258-q of the Agriculture and Markets Law (Cons. Laws, ch. 69) which permits a class of milk dealers who were engaged in that business at a speci-

fied date to sell milk at a price lower than dealers of the same class who entered the business thereafter are required to charge is valid and not violative of section 1 of the Fourteenth Amendment of the Federal Constitution. The Legislature had power to correct a demoralized condition in the milk business by the establishment of a uniform fair price at which milk could be sold and it may reasonably have determined from the facts before it that new competition in the class referred to, during the emergency period, would have an injurious effect upon the result which it was attempting to accomplish. If the Legislature believed the limitation had a reasonable relation to its desired purpose and the facts reasonably justified that belief, it acted within its jurisdiction.

Matter of Mayflower Farms, Inc., v. Baldwin, 242 App. Div. 881, affirmed.

(Argued February 25, 1935. Decided April 16, 1935)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 3, 1934, which confirmed, on certiorari, a determination of Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control, [fol. 95] denying an application by petitioner for a milk dealer's license.

Seymour Ellenbogen and Bernard Ellenbogen for appellant: The time limitation created by the words "since April tenth, nineteen hundred thirty-three," in the unadvertised differential provision, which prevents the appellant from enjoying and exercising the privilege thereby conferred, is upon its face arbitrary, discriminatory, unjust, irrational, prejudicial, unreasonable, confiscatory, invalid and unconstitutional and denies to the appellant the equal protection of the laws. (Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; Smith v. Cahoon, 283 U. S. 553; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163; Nebbia v. New York, 291 U. S. 502; Lawton v. Steele, 152 U. S. 133; Colon v. Lisk, 153 N. Y. 188; Wright v. Hart, 182 N. Y. 330; Lochner v. New York, 198 U. S. 45; People v. Gilbert, 68 Misc. Rep. 48; Matter of Berger v. Quinn, 149 Misc. Rep. 545; People v. Marx, 99 N. Y. 377; People ex rel. Farrington v. Mensching, 187 N. Y. 8; People v. Beakes Dairy Co.,

222 N. Y. 416; People ex rel. Tyroler v. Warden, 157 N. Y. 116; Fisher Co. v. Woods, 187 N. Y. 90; Adams v. Tanner, 244 U. S. 590; Pabst Corp. v. Milwaukee, 190 Wis. 349; Matter of Pell, 171 N. Y. 48.) The time limitation may be excised from the unadvertised differential privision without doing violence to the intention of the Legislature and without hampering or impairing the effectiveness of the provision or of the Milk Control Law. (Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 270.)

Henry S. Manley for respondents: There was good reason for limiting the privilege of selling at the unadvertised price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. That classification is not unconstitutional. (Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; Buck v. Bell, 274 U. S. 200; Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92; Cooper v. Rollins, 152 Ga. 588; People [fol. 96] v Logan, 284 Ill. 83; Criswell v. State, 126 Md. 103; Commonwealth v. Ward, 136 Ky. 146; State v. Creditor, 44 Kan. 565; Matter of Whitley, 144 Cal. 167; Bowen v. Schenectady, 136 Misc. Rep. 307; 231 App. Div. 779; Sammarco v. Boysa, 193 Wis. 642; Manheim v. Harrison, 64 La. 564; Aurora v. 1Burns, 319 Ill. 84; Spector v. Building Inspector, 250 Mass. 63; City of New York v. Kelsey, 158 App. Div. 183; 213 N. Y. 638; Baylis v. Van Nostrand, 176 App. Div. 396; Commonwealth v. Charity Hospital, 198 Penn. St. 270; Commonwealth ex rel. Elkin v. Charity Hospital, 199 Penn. St. 119.)

OPINION

HUBBS, J.:

Appellant is a domestic corporation engaged in the sale of milk at wholesale to stores in New York City. It was organized in May, 1933. In April, 1934, it made application for a milk dealer's license. A hearing was held upon the application and it was found that appellant was engaged in selling an unadvertised brand of milk, that is, milk not having a well-advertised trade name. The application was denied for the reason that appellant had violated a price-fixing order by selling milk at the unadvertised price which was one cent per quart below the price fixed by respondent for the sale of milk having a well-advertised trade name. It was decided that as appellant was not engaged in

the milk business on April 10, 1933, it was not entitled to avail itself of the one cent unadvertised price differential provided for in section 258-q of the Agriculture and Markets Law (Cons. Laws, ch. 69) which became effective April 1, 1934.

Chapter 158, section 317, subdivision c. of the Laws of 1933, was substantially the same as chapter 126, section 2 (258-q), of the Laws of 1934, which reads as follows:

"It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores [fol. 97] in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city."

The words in brackets were eliminated in the revision of the law in 1934 and the words in italics were added. The effect is to leave the date April 10th, 1933, the same in both enactments.

The sole constitutional question urged is that the provision of section 258-q allowing unadvertised dealers to sell milk at a lower price than advertised dealers, provided they were engaged in the business on April 10th, 1933, and preventing unadvertised dealers who became such subsequent to that date from selling at a lower price, is unconstitutional and void in that it violates section 1 of the 14th Amendment of the United States Constitution.

The constitutionality of the emergency legislation embodied in the milk regulation law, chapter 158 of the Laws of 1933, in various phases has been passed upon by the courts. People v. Nebbia (262 N. Y. 259; affd., 291 U. S. 502) passed upon the price fixing provision and held it to be constitutional. In Matter of Eisenberg Farms, Inc., v. Baldwin (265 N. Y. 662) this court decided that the differential clause in favor of co-operative associations which

permitted them to pay to producers less than the price fixed by the Commission for milk was constitutional. The case of Borden's Farm Products Co. v. Baldwin (7 Fed. Supp. 352; reversed and remanded to the court to make findings of fact in 293 U. S. 194, without passing upon the constitutional question) involved the question of the constitutionality of the unadvertised differential provision in its entirety. The statutory court provided for by section 266 of the Judi- [fol. 98] cial Code (28 U. S. C. A., § 380) held it to be constitutional in an opinion by Judge Learned Hand.

The opinions in those cases have stated in great detail the conditions in the milk producing and marketing business in the State at and prior to the date of the enactment in question. They call attention to the fact that the statute was enacted after careful and extended investigations by committees of the Legislature into the milk business as a whole. They point out the chaotic condition existing in the business and the injurious effect produced thereby upon the farmers of the State engaged in milk production, upon the public health and general welfare.

We do not feel called upon to restate the conditions so fully stated in those opinions. We confine our discussion to the single question of whether the Legislature exceeded its power in fixing a specific date, the date when the original statute became effective, April 10, 1933, as the date after which unadvertised dealers not in business at that time were prohibited by the effect of the act from selling milk at a price less than that at which advertised dealers were required to sell.

In New York City there are four large corporations engaged in the milk business. Their brands of milk are highly advertised and well known to all retail dealers and purchasers of milk. The have come to be known as the advertised companies. There were hundreds of small dealers who sold unadvertised brands and they are known as the unadvertised dealers. They purchase their milk from about 50,000 independent farmers. When the Legislature determined upon the policy of regulating and fixing the price at which milk could be sold it was confronted by the fact that the unadvertised dealers could not successfully compete with the advertised dealers, if required to sell their unadvertised milk at the same price at which the advertised dealers sold. Prior to that time the unadvertised

dealers had sold milk about one cent per quart less than [fol. 99] the price charged by advertised dealers. The market was familiar with that condition and, as a result, farmers selling milk to the dealers had become divided into two classes, one selling to the advertised dealers which owned and operated large and extensive plants in favorable localities for collecting and shipping milk, and the other, known as independent farmers, selling to the unadvertised dealers, less favorably equipped, but still, on the whole, having large sums invested in their business. It was believed that the effect of establishing a uniform price at which milk should be sold by all dealers would be to drive the unadvertised dealers out of business and work a practical confiscation of their property. That would also deprive about 50,000 farmers of a market for their milk and leave them unprotected. At the same time it would consolidate the entire milk business of New York city in the four large advertised companies.

To meet the situation, the Legislature enacted the provision allowing a differential price in favor of the unadvertised dealers and that provision has thus far been held to be constitutional. (Borden's Farm Products Co. v. Baldwin, supra.)

The effect of the act was to maintain the competitive position of the two classes of dealers in the same condition which existed before the enactment. Before the enactment, any person could go into the milk business at any time and sell his milk at any price at which he chose to sell it. The result had been that small dealers would attempt to break into the business by underselling which usually resulted in financial disaster to themselves and to the farmers from whom they had purchased their milk on credit. It also resulted in a general tendency to keep the price of milk paid to farmers down to a point where it demoralized the whole milk business. The primary purpose of the Legislature was to correct that condition by the establishment of a uniform fair price at which milk could be sold. We have held that the act in that respect was constitutional [fol. 100] (People v. Nebbia, supra), although its practical effect would be, without the differential clause, to prevent new dealers from entering the field, as no new dealer could hope successfully to compete with the established advertised dealers selling well-known advertised brands.

Appellant does not question the power of the Legislature to provide for the fixing of a uniform price for the sale of milk, but argues that when it provided for fixing a uniform price and then because of the factual situation provided for a differential in favor of those unadvertised dealers then engaged in the business, it thereby in effect prohibited all others from engaging in the business as unadvertised dealers and exceeded its power. It urges that such limitation has no reasonable relation to the main purpose of the act but constitutes an arbitrary, discriminatory and unreasonable limitation which denies to it the equal protection of the law.

If the Legislature believed the limitation had a reasonable relation to the purpose which it desired to accomplish by the enactment and the facts reasonably justified that belief, then it acted within its jurisdiction and it is not for the courts to determine that it acted unwisely, although the effect of its action may deprive the appellant and others so situated from engaging in the milk business as unadvertised dealers during the emergency period specified in the act.

The Legislature in effect provided that all milk dealers must sell at a uniform price, but owing to the factual situation it also provided that those engaged in the business as unadvertised dealers at the date of the original enactment should have the benefit of the differential. The act does not prevent by its terms others from engaging in the business provided they sell at the uniform price, neither does it prevent others from becoming unadvertised dealers. It only has that effect during the period of the emergency specified in the act. We believe that the Legislature could have rea- [fol. 101] sonably determined from the facts before it that new competition in the unadvertised class of dealers during the emergency period would have an injurious effect upon the result which it attempted to accomplish by the enactment.

It had before it evidence of the disastrous effect of unlimited competition in the business at the time of the enactment and prior thereto. It was attempting to stabilize the industry during a limited period only and it had the authority to enact any law which it deemed advisable to accomplish that purpose, provided the law so enacted had a reasonable relation to that purpose.

The act not only had the effect of limiting to those engaged in the unadvertised milk business at the date of the first act the privilege of the differential, but it also prevented the large holding companies, known as advertised dealers, from dissolving those companies and permitting the subsidiary corporations thereof from engaging in the sale of milk in competition with the unadvertised dealers and enjoying the privilege of selling at one cent per quart less than the uniform price. It might reasonably anticipate such action on the part of the large holding companies. It might also reasonably foresee that such action would result in driving unadvertised dealers from the field, with great financial loss to them and to thousands of farmers who were dependent upon them for a market for their milk, thus tending to defeat the very purpose which the differential clause was enacted to prevent.

"The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people" (Pp. 538, 539). "If one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." (Nebbia v. New York, 291 U. S. 502, 534.)

We believe that the provision of the statute in question has a reasonable relation to the legislative purpose which [fol. 102] was in itself legal and that it is neither arbitrary nor discriminatory.

The order should be affirmed, with costs.

Dissenting Opinion

Finch, J. (dissenting):

Assuming but not deciding that the unadvertised differential provision is constitutional, is the provision limiting its application to dealers in the field "since April 10, 1933," reasonably adapted to the end to be accomplished, or does it go further and infringe arbitrarily and unreasonably upon the rights of the appellant and other dealers who have entered the business since that time and deny to them the equal protection of the laws? It is true that in a highly-organized society the liberty of each individual must yield to the public need when it appears that the interest of the public generally, as distinguished from that of a particular

class, requires it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. (Lawton v. Steele, 152 U. S. 133, 137; Colon v. Lisk, 153 N. Y. 188, 196; Wright v. Hart, 182 N. Y. 330.) To sustain such legislation under the police power, the courts must be able to find that it tends in some degree to prevent an evil or to preserve public health, morals, safety or welfare. When no such tendency is disclosed and the legislation impinges upon the liberty and interferes with the property of private citizens, the duty of the courts is to declare it invalid for undue interference with the right of a person to pursue unmolested and without unreasonable regulation any lawful calling which he may choose, has always been condemned under our form of government. (Lochner v. New York, 198 U. S. 45.)

When we approach the case at bar from the standpoint of an individual who desires to enter the milk business, we find that the door is effectively closed to him. Denying the individual the price differential is as effective as a direct prohibition.

[fol. 103] Mr. Justice Cardozo, in discussing the same Milk Control Law in Hegeman Farms Corp. v. Baldwin (293 U. S. 163, 169), said:

"What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant [an unadvertised dealer] is able to charge." (Words in brackets inserted.)

The basic purpose of the Milk Control Law was to afford protection and assistance to the farmers. The only claimed reason for the price differential was to prevent the price fixing provisions forcing the unadvertised dealer out of business, leaving complete control in the hands of the advertised dealers. The limitation on the number of unadvertised dealers, however, is of no benefit to the farmer, nor does it tend to preserve the status quo, or protect competitive conditions or opportunities existing just prior to the enactment of the Milk Control Law. On the contrary, this time provision limits the field of distribution for the farmer by limiting the number of independent dealers. Nor does the requirement in any way tend to prevent monopolistic control by the advertised dealers.

It is claimed that the differential in price is necessary for the preservation of the independent milk distributor for, if the price charged by all were the same, those doing business under a well-advertised name would tend to absorb the entire market. When the Legislature went further and conferred the additional benefit of a monopoly on those unadvertised dealers already in the business by preventing any newcomer from entering, they gave an advantage to the independent dealer which went far beyond the requirements of the circumstances. It transforms the provision from one aimed to prevent a monopoly by the well-advertised dealers into one creating a monopoly by the unadvertised dealers.

On the one hand, by the differential an attempt is made to preserve competitive conditions as they existed before the statute, and yet, on the other hand, it abolishes and [fol. 104] wipes out competitive conditions by prohibiting the normal and natural emergence of new dealers into the field. This provision might have provided for one set of qualifications for milk dealers who were engaged in business prior to April 10, 1933, and another and more stringent set for those who came in thereafter. The Legislature might have provided for stricter regulations concerning different classes of milk dealers. (Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92; Spector v. Building Inspector, 250 Mass. 63.) The regulations could be validly based on conditions, as for example, the grades of milk sold, and the character of distribution. To prescribe qualifications for entrance into the business or to prescribe regulations covering the different classes, is entirely different from proscribing, in effect, the right to engage in such business altogether. The record shows that the identical brand of milk sold by appellant is sold by several other independent milk dealers, competitors of appellants, to the same class of retailers in the same stores and on the same streets. Why should the appellant have to charge one cent more per quart for his milk than his competitors charge? The appellant is in the same class with these competitors. Why the unfair discrimination? Without any apparent justification it discriminates between one entering the milk business prior to April 10, 1933, and a dealer entering on the next day. One looks in vain to find a reason for this discrimination. The only reason given is

that the Legislature did not wish to increase or intensify the competition against the advertised dealers by permitting new dealers to join the class of the unadvertised dealers. In other words, a monopoly was given to the unadvertised dealers so as not to increase the competition against the advertised dealers. Is it not apparent that this reason is in fact no reason at all and is only given in an attempt to justify an unjustifiable discrimination? Another reason given is that the advertised dealers might per- [fol. 105] mit their subsidiaries to enter the field of the independent dealer. As the only justification for the differential against the advertised dealer is the potent sales appeal of the well-advertised name, no reason remains when the company sells the milk under another name. Thus does the monopoly given to the independent dealers stand without justification or reason.

Peculiarly applicable to the case at bar is the language which appears in Matter of Pell (171 N. Y. 48, at p. 59):

"The learned counsel for the appellant states a very apt illustration in his brief, as follows: 'We often hear it declared that the legislature may designate watches and carriages as a class of property and subject the same to the payment of duties and taxes, but would anyone claim that a law declaring that all watches or carriages which were purchased prior to June 30, 1885, should be appraised and taxed could be sustained upon the ground that such law merely designated a class of property for taxation?' Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification."

Just as watches are watches and carriages are carriages, regardless of when acquired, so are milk dealers selling unadvertised brands of milk, milk dealers selling unadvertised brands of milk, regardless of when they entered the milk business. If this time provision is valid then a similar provision would be valid which designates more exactly those intended to be benefited. Also such a monopolistic class as named by this statute will tend continually to become narrower and thus destroy itself and tend to play more into the hands of the advertised dealers because of this very provision shutting the door absolutely against

new-comers in the field. Therefore, the general public will suffer from this monopoly given to the independent dealer.

Thus the statute by reason of the insertion of this time limitation not only makes a present of a monopoly to the [fol. 106] independent dealer, but in addition is foreign to the purpose of the law, which is alleged to be an attempt to preserve competitive conditions.

The presumption which attaches in favor of legislative action is of no avail where it is evident that the classification established by the statute is arbitrary. (Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209, 210; Smith v. Cahoon, 283 U. S. 553; Southern Ry. Co. v. Greene, 216 U. S. 400, 417.)

Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz., "since April 10, 1933." With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well-advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded.

The order of confirmation of the Appellate Division should be reversed and the determination of the respondents should be annulled.

Lehman, Crouch and Loughran, JJ., concur with Hubbs, J.; O'Brien, J., concurs in result on the authority of People v. Nebbia (262 N. Y. 259; affd., 291 U. S. 502); Finch, J., dissents in opinion, in which Crane, Ch. J., concurs.

Order affirmed.

[fol. 107] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—April 20, 1935

The above named petitioner, Mayflower Farms, Inc., having appealed from a determination of the defendants-respondents made by official order dated the 9th day of July, 1934, denying the petitioner-appellant's application for a milk dealer's license pursuant to the provisions of Chapter 126 of the Laws of 1934, and the said petitioner having on the 27th day of July, 1934, obtained from this Court an order of certiorari which said order was thereafter duly entered in the office of the Clerk of the County of Albany on the 17th day of August, 1934, and the defendants having duly made their return thereto, and the matter having come on to be heard and argued before the Appellate Division, Third Department, at a term thereof held in the City of Albany on the 22nd day of September, 1934, and the said Appellate Division having confirmed the determination of the defendants, with $50.00 costs, and an order to that effect having been duly entered on the 3rd day of November, 1934, and an appeal having been taken to the Court of Appeals and said Court having heard said appeal and having ordered and adjudged that the order so appealed from be affirmed with costs,

[fol. 108] Now, therefore, upon the remittitur of the said Court of Appeals and upon motion of Henry S. Manley, Esq. (Robert G. Blabey, Esq., of counsel), attorney for the defendants, it is hereby ordered, adjudged and decreed that the said judgment of the Court of Appeals be and the same is hereby made the order and judgment of this Court, and that the said determination of the defendants, dated July 9, 1934, denying petitioner's application for license as aforesaid, be and the same is hereby affirmed, with the costs of this appeal against the petitioner to be taxed.

Enter.

Gilbert V. Schenck, J. S. C.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 109] IN SUPREME COURT OF NEW YORK,
ALBANY COUNTY

In the Matter of the Application of MAYFLOWER FARMS, INC., Petitioner,

for a Certiorari Order against

CHARLES H. BALDWIN, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth Fee, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, Defendants

JUDGMENT ON REMITTITUR

The above named petitioner, Mayflower Farms, Inc., having appealed from a determination of the defendants made by official order dated the 9th day of July, 1934, denying the petitioner's application for a milk dealer's license pursuant to the provisions of Chapter 126 of the Laws of 1934, and the said petitioner having on the 27th day of July, 1934, obtained from this Court an order of certiorari, which said order was thereafter duly entered in the office of the Clerk of the County of Albany on the 17th day of August, 1934, and the defendants having duly made their return thereto, and the matter having come on to be heard and argued before the Appellate Division, Third Department, at a term thereof held in the City of Albany on the 22nd day of September, 1934, and the said Appellate Division having confirmed the determination of the defendants with $50.00 costs, and an order to that effect having been duly entered on the 3rd day of November, 1934, and an appeal having been taken to the Court of Appeals and that Court having heard said appeal and having ordered and adjudged that the order so appealed from be affirmed with costs,

And the record remitted from the Court of Appeals having been duly filed in the Albany County Clerk's office on the 20th day of April, 1935, and an order having been duly made, and entered thereon the same day making the judgment and order of the Court of Appeals the judgment [fol. 110] and order of this Court and directing the entry of a judgment of affirmance herein, together with the costs of said appeal against the said petitioner to be taxed, now,

on motion of Henry S. Manley, Esq. (Robert G. Blabey, Esq., of counsel), attorney for the defendants,

It is adjudged that the order of the defendants dated the 9th day of July, 1934, denying petitioner's application for a milk dealer's license, pursuant to the provisions of Chapter 126 of the Laws of 1934, be and the same is hereby affirmed, and

It is further adjudged that the defendants herein recover of the petitioner herein the sum of One Hundred Seventy-One Dollars and Ninety-Five Cents ($171.95), the amount of their costs herein as taxed and have execution against the said petitioner therefor.

John A. Knox, Clerk.

Dated at the City of Albany, New York, this 26th day of April, 1935.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 111] In Supreme Court of the United States, October Term, 1935

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal

The above-named Mayflower Farms, Inc., considering itself aggrieved by the order and judgment of the Supreme Court of Albany County, entered upon the remittitur and the final decision of the Court of Appeals of the State of New York, handed down April 16, 1935, in this cause, which said court is the highest court of the State of New York in which a decision in this suit and matter could be had, hereby prays that an appeal by this appellant be allowed herein to the Supreme Court of the United States to the end that said order and judgment and the decision of the said Court of Appeals upon which the same were entered may be there reviewed and considered and justice done this appellant, and that an order be made allowing such appeal, fixing the amount of the bond required of the appellant herein on such appeal and staying and restraining the appellees, their agents, servants and employees, during the

pendency and until the final determination of such appeal by the Supreme Court of the United States, from instituting any proceeding or bringing any action to execute, carry out or enforce the order of said appellees, dated July 9, 1934, denying appellant's application for a milk dealer's [fol. 112] license upon the ground that appellant unlawfully exercised the one cent per quart underselling privilege conferred upon unadvertised dealers of milk in cities having a population of one million or more by section 258-q of the Agriculture and Markets Law of the State of New York, and the order and judgment of the Supreme Court of Albany County from which an appeal is herein sought confirming said order of said appellees, provided, however, that appellant shall comply with all of the provisions of the Agriculture and Markets Law of the State of New York and of the rules and orders of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, as though it were in fact licensed as a milk dealer, excepting only so much of the last sentence of section 258-q of the said Agriculture and Markets Law as prevents the appellant from exercising the one cent per quart underselling privilege hereinbefore mentioned.

Assignment of Errors

The appellant, Mayflower Farms, Inc. assigns the following errors in the record and proceedings had in this case:

The Court of Appeals erred:

1. In holding that the time limitation created by the words "since April tenth, nineteen hundred thirty-three" contained in the last sentence of section 258-q of the Agriculture and Markets Law of the State of New York, which prevents the appellant from exercising the one cent per quart underselling privilege conferred by such sentence upon milk dealers selling unadvertised brands of milk in cities having a population of one million or more, was neither arbitrary nor discriminatory and did not deny to the appellant the equal protection of the laws and the due process guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

2. In holding that such time limitation had a reasonable relation to the legislative purpose underlying the milk con-

trol laws of the State of New York and, consequently, that [fol. 113] its inclusion in the "unadvertised differential" provision by the Legislature was a valid exercise of the police power of the State.

3. In holding that there were facts before the Legislature of the State of New York which justified the inclusion of such time limitation in the "unadvertised differential" provision.

4. In affirming the order of the Appellate Division which confirmed the determination and order of the appellees denying the appellant's application for a milk dealer's license on the ground that appellant had unlawfully exercised the one cent per quart underselling privilege conferred by the "unadvertised differential" provision.

5. In failing to hold that the time limitation hereinbefore mentioned was arbitrary, discriminatory and unreasonable and denied the appellant due process and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and in failing to hold that such limitation could be exercised from the milk control law of the State of New York.

6. In failing to reverse the order of the Appellate Division and in failing to annul the determination and order of the appellees on the ground that so much of the milk control law as furnished the basis for their denial of the appellant's application for a milk dealer's license, under Chapter 126 of the laws of 1934, was unconstitutional, void and of no force and effect whatsoever.

Prayer for Reversal

Because of the foregoing errors, the appellant, Mayflower Farms, Inc., prays that the said order and judgment of the Supreme Court of the State of New York and that the said decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above-entitled cause, be reviewed by the Supreme Court of [fol. 114] the United States and reversed and judgment rendered in favor of the appellant, with costs in all courts.

Max Cohen, Seymour Ellenbogen, Counsel for Appellant, 75 State St., Albany, N. Y. Seymour Ellenbogen, Bernard Ellenbogen, of Counsel.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 115] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above-entitled suit having prayed for the allowance of an appeal herein to the Supreme Court of the United States from the order and judgment of the Supreme Court of the State of New York, entered in the office of the Clerk of Albany County April 20, 1935, and April 26, 1935, respectively, upon the remittitur and final decision of the Court of Appeals of the State of New York, handed down April 16, 1935, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes of the United States and the Rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of the County of Albany and State of New York, to which court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings, order and [fol. 116] judgment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order; and it is further

Ordered that, pending the final determination by the Supreme Court of the United States of the appeal hereby allowed, the appellees, their agents, servants and employees be, and they hereby are, stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce the order of the appellees, dated July 9, 1934, denying appellant's application for a milk dealer's license and the order and judgment of the Supreme Court of the State of New York, confirming said order, provided, however, that appellant shall comply with all of the provisions of the Agriculture and Markets law of the State of New York and with all of the rules and orders of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York as though it were in fact duly licensed as a milk dealer, excepting only so much

of the last sentence of section 258-q of the Agriculture and Markets law as prevents the appellant from exercising the one cent per quart underselling privilege conferred by such sentence upon dealers selling unadvertised milk in cities having a population of more than one million; and it is further

Ordered that security for costs and damages herein be fixed in the sum of 500 dollars.

Dated July 10, 1935.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York. (Seal County of Albany, July, 1841.)

Clerk's certificate to foregoing paper omitted in printing.

[fols. 117 & 118] Bond on Appeal for $500.00, approved and filed July 31, 1935, omitted in printing.

[fol. 119] Citation in usual form, showing service on Henry S. Manley, filed July 12, 1935, omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed July 31, 1935

It is hereby stipulated between appellant and appellees herein, by their respective counsel, and the said counsel hereby indicate as the portions of the record to be included in the transcript herein, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the following papers:

(Omit statement under Rule 234, Orig. Record, pp. 1 and 2.)

Order of Certiorari, Orig. Record, pp. 3, 4, 5 and 6.

Notice of Application for Certiorari Order, Orig. Record, pp. 6 and 7,

Petition of Mayflower Farms, Inc., Orig. Record, pp. 7 to 14 inclusive.

(Omit verification of Bertha Silberman, pp. 14 and 15, Orig. Record.)

(Omit answering affidavit in opposition to application for stay, Orig. Record, pp. 15 to 19 inclusive.)

Return to Order of Certiorari, pp. 19 to 22 inclusive, Orig. Record.

Exhibits annexed to return, as follows:

Exhibit No. 2, Application for milk dealer's license, Orig. Record, pp. 22 to 33 inclusive.

(Omit corporate acknowledgment, Orig. Record, p. 33.)

Exhibit No. 1, Notice of hearing, Orig. Record, pp. 34, 35 and 36.

[fol. 121] (Omit official return receipt of post-office Department, Orig. Rec. p. 37.)

Exhibit No. 3, list of customers of Mayflower Farms, Inc., Orig. Rec., pp. 38 and 39.

(Omit Exhibit No. 4, official order revoking license of Mayflower Farms, Inc., under 1933 Milk Control Law, Orig. Rec., pp. 40 and 41.)

(Omit Exhibit No. 5, Order of Appellate Division dismissing appeal from revocation order under the 1933 Milk Control Law, Orig. Rec., pp. 42, 43 and 44.)

Exhibit No. 6, sample of cap used on Mayflower Farms, Inc., milk bottles, Orig. Rec., p. 45.

Transcript of minutes of hearing held June 18, 1934, Orig. Rec., pp. 45 to 80 inclusive.

Memorandum of J. W. Harnach recommending refusal to grant a license, Orig. Rec., pp. 81 and 82.

Memorandum of Robert G. Blabey, Assistant Counsel to the Department of Agriculture and Markets, transmitting recommendation of J. W. Harnach to Director Kenneth F. Fee, Orig. Rec., p. 82.

Memorandum of Mr. Fee directing preparation and service of an order denying the Mayflower Farms, Inc., application for a license, Orig. Rec., p. 83.

Official Order denying appellant's application for milk dealer's license, dated July 9, 1934, Orig. Rec., pp. 84 and 85.

(Omit Stipulation of substitution of attorneys for Mayflower Farms, Inc., Orig. Rec., pp. 85 and 86.)

(Omit Stipulation settling case and consent that same be filed, Orig. Rec., pp. 86 and 87.)

(Omit Stipulation waiving certification, Orig. Rec., p. 87.)

Notice of appeal to Court of Appeals, Orig. Rec., pp. 88 and 89.

Order of confirmation of the Appellate Division, Orig. Rec., pp. 90 and 91.

Affidavit of no opinion, except dissenting memorandum by Hill, P. J., Orig. Rec., pp. 91 and 92.

(Omit stipulation waiving certification of record to Court of Appeals, Orig. Rec., p. 93.)

Remittitur of the Court of Appeals.

Order of Affirmance of Hon. Gilbert V. Schenck, dated April 20, 1935.

Judgment of Affirmance, Supreme Court, Albany County, entered April 26, 1935.

Prevailing and dissenting opinions of the Court of Appeals.

[fol. 122] Order allowing appeal to the Supreme Court of the United States.

Petition for Appeal, assignment of errors and prayer for reversal.

Statement as to jurisdiction on appeal, and opposing statement, pursuant to Rule 12 of the Rules of the Supreme Court of the United States.

Bond on Appeal.

Citation and Return thereon.

Stipulation as to transcript of record.

Dated Albany, N. Y., July 31, 1935.

Seymour Ellenbogen, Attorney for Appellant.
Henry S. Manley, Attorney for Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 122a] Due and personal service of the within Stipulation is admitted this 31 day of July, 1935.

Henry S. Manley, Attorney for Appellees.

[fol. 123] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 8, 1935

SIR:

Please take notice that the within is a true copy of the appellant's statement of points to be relied upon, and designation of the parts of the record to be printed.

Dated, Albany, N. Y., August 6th, 1935.

Yours, etc., Seymour Ellenbogen, Attorney for Appellant, Office and Post Office Address, 75 State St., Albany, N. Y.

To: Henry S. Manley, Esq., Counsel for Appellees, State Office Bldg., Albany, N. Y.

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely herein are the same as the six items listed in the Assignment of Errors heretofore filed.

[fol. 124] And the appellant further states that it considers that the parts of the record necessary for the consideration of this cause are all the same parts listed in the stipulation as to transcript of record heretofore filed herein and therein indicated as the portions of the record to be included in said transcript.

Max Cohen, Seymour Ellenbogen, Counsel for Appellant.

[fol. 125] STATE OF NEW YORK,
City and County of Albany, ss:

Lillian D. Campagna, being duly sworn, deposes and says: I am over the age of 21 years; that on the 6th day of August, 1935, I served the annexed statement of points to be relied upon, and designation of the parts of the record to be printed, pursuant to paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, upon Henry S. Manley, Esq., counsel for the appellees herein, by depositing in a United States post office a copy of said statement and designation securely enclosed in a sealed and postpaid wrapper addressed to the said Henry S. Manley, at the State Office Building, Albany, N. Y.

Deponent further states that she caused the said sealed and postpaid wrapper so addressed to be sent by registered mail and that in the usual course of delivery said statement and designation will be delivered to the said addressee on August 7, 1935.

Lillian D. Campagna.

Sworn to before me this 6th day of August, 1935. Bernard Ellenbogen, Com'r of Deeds, Albany, N. Y.

[fol. 126] [File endorsement omitted.]

Endorsed on cover: File No. 39,903. New York, Supreme Court. Term No. 349. Mayflower Farms, Inc., Appellant, vs. Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, et al. Filed August 7, 1935. Term No. 349, O. T. 1935.